

3063

See Vol.
3058

No. 15871

United States
Court of Appeals
for the Ninth Circuit

CLARENCE A. KOLSTAD and ALTA A.
KOLSTAD,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 270)

FILED

JUN 16 1958

PAUL P. O'BRIEN, CLERK

Appeal from the United States District Court
for the District of Montana,

No. 15871

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Appeal from the United States District Court
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Lands Division,
Washington, D. C.

In the United States District Court
for the District of Montana,
Havre Division

Civil No. 1726

UNITED STATES OF AMERICA,

Plaintiff,

vs.

11,211.45 Acres of Land, More or Less, in the Counties of Liberty and Toole, State of Montana;
CLARENCE A. KOLSTAD, et al., and UNKNOWN OWNERS,

Defendants.

COMPLAINT

1. This is an action of a civil nature brought by the United States of America at the request of the Acting Solicitor of the Department of the Interior for the taking of property under power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is:

Act of June 17, 1902, and all acts amendatory thereof or supplementary thereto (32 Stat. 388, 43 U.S.C., 1946 ed., sec. 371, et seq.);

Act of August 1, 1888 (25 Stat. 357, 40 U.S.C., 1946 ed., Supp. V, sec. 257), as amended;

Act of February 26, 1931 (46 Stat. 1421, 40 U.S.C., 1946 ed., secs. 258a-258e), and acts amendatory thereof or supplemental thereto;

Section 9 of the Act of December 22, 1944 (58 Stat. 887, 891);

Section 2 of Reorganization Plan No. 3 of 1950 (15 F.R. 3174);

Section 28 of Order No. 2509, as amended (17 F.R. 6794);

Interior Department Appropriation Act, 1955 (68 Stat. 361, 365; and,

Declaration of Taking dated April 27th, 1955, and filed herewith.

3. The public use for which said lands and interests therein are taken is the absolute fee simple title, together with all the rights and privileges incident to the use and enjoyment thereof, for the construction of a dam and appurtenant facilities, and a reservoir site all in connection with the Tiber Dam and Reservoir, Lower Marias Unit, Missouri River Basin Project.

4. The property to be taken is described in Schedule A in 7 sheets hereto attached and by reference made a part hereof.

5. The estate to be acquired in the property described in Schedule A hereto attached is the absolute fee simple title thereto, including all improvements, excepting however, and reserving to the owners thereof, their heirs and assigns, all oil, gas and other minerals except sand, gravel and other materials used in the construction of the Lower Marias Unit, together with the right to prospect for, mine and remove the same, but any rights exercised under such reservations shall be exercised in such

a manner as not to interfere with the construction, operation and maintenance of the Tiber Dam and Reservoir as may be determined by the United States, acting through the Secretary of the Interior or his duly authorized representative. It is understood that mineral-like methods shall be employed in the extraction and removal of any such oil, gas and other minerals, and that all necessary precautions shall be taken to prevent the pollution of water stored in the said Tiber Reservoir or flowing in the Marias River and it is also understood that no pollution from such operations shall affect the quality of such water for irrigation, municipal or miscellaneous uses, and the determination of the Secretary of the Interior or his duly authorized representative, acting for and on behalf of the United States with respect thereto, shall be final and conclusive. Any operations under said reservation by the owner thereof, his heirs, assignees or lessees, shall be at their sole risk.

6. The persons having or claiming an interest in the property whose names are ascertainable by a reasonably diligent search of the records, and those whose names have otherwise been learned, are:

Parcel No. 10

C. A. Kolstad, also known as Clarence A. Kolstad, and Alta A. Kolstad, husband and wife; Amerada Petroleum Corporation, a corporation; Robert C. Balsam and Mary F. Balsam, his wife; Frank H. Wasson and ——— Wasson, his wife, if any; G. A.

Thiel and ——— Thiel, his wife, if any; and, Lila Jane MacGowan, a feme sole.

Parcel No. 11

G. W. Kolstad, a single man; Amerada Petroleum Corporation, a corporation; Nick Laas, Executor of the Estate of Martin Wasesha, deceased; Thomas F. Wallace and ——— Wallace, his wife, if any; and, Wells-Dickey Company, a corporation.

Parcel No. 27

Clarence I. Underdal and Ruth Underdal, his wife; Isaac R. Denson and Mary O. Denson, his wife; and, Great Falls National Realty Company, a corporation.

Parcel No. 28

Isa E. Denson, a feme sole; Toole County, a political subdivision of the State of Montana; and, Helen L. Purdy, a feme sole; and Shadrach P. Denson and Antoinette G. Denson, his wife.

Parcel No. 29

Isa E. Denson, Executrix, and Norman M. Denson, Executor, of the Estate of Mayette E. Denson, deceased; Isa E. Denson, a feme sole; Shadrach P. Denson and Antoinette G. Denson, his wife; Isa E. Denson, Norman M. Denson, Shadrach P. Denson, and Mayette E. Denson, Jr., heirs of Mayette E. Denson, deceased; the unknown heirs and creditors of Mayette E. Denson, deceased; Marias River

Electric Cooperative, Incorporated, a cooperative;
and, The Great Falls National Bank, a corporation.

Parcel No. 31

Alton L. Knutson, a single man; Toole County, a political subdivision of the State of Montana; W. Coburn Cook and Ruth E. Cook, husband and wife; and, W. E. Buell and ——— Buell, his wife, if any.

7. The County of Liberty, State of Montana, and the County of Toole, State of Montana, may have or may claim an interest in the property by reason of taxes and assessments due and exigible.

8. In addition to the persons named, there are or may be others who have or may claim some interest in the property to be taken whose names are unknown to the plaintiff, and such persons are made parties to the action under the designation “unknown owners.”

Wherefore, the plaintiff demands judgment that the property be condemned and that just compensation for the taking be ascertained and awarded, and for such other relief as may be lawful and proper.

Dated this 23rd day of May, 1955.

KREST CYR,

United States Attorney for the
District of Montana;

/s/ DALE F. GALLES,

Assistant United States Attorney for the District
of Montana; Attorneys for Plaintiff.

Trial by jury of the issue of just compensation is demanded by the plaintiff.

/s/ DALE F. GALLES,
Assistant United States Attorney for the District
of Montana.

Designation of Service

Comes now Dale F. Galles, Assistant United States Attorney for the District of Montana, and, pursuant to Rule 34 of the Rules of Practice of the United States District Court for the District of Montana, hereby designates and consents that all subsequent papers in the above-entitled cause, except writs and process, may be made upon him, as the attorney for the plaintiff in the above-entitled cause, at the office of the United States Attorney, in and for the District of Montana, in the Federal Building, Billings, Montana.

/s/ DALE F. GALLES,
Assistant United States Attorney for the District
of Montana.

Schedule A

Land Situated in Toole and Liberty Counties,
Montana Description

Parcel No. 10

The South Half of the South Half ($S1\frac{1}{2}S1\frac{1}{2}$), of Section Eleven (11), Lots Two (2), Three (3), Four (4), Five (5), Six (6), Seven (7), Eight (8), the West Half of the Northeast Quarter ($W1\frac{1}{2}NE1\frac{1}{4}$),

the North Half of the Northwest Quarter ($N\frac{1}{2}NW\frac{1}{4}$), of Section Thirteen (13), Lots One (1), Two (2), Three (3), Four (4), Five (5), Six (6), Seven (7), Eight (8), Nine (9), Ten (10), Eleven (11), Twelve (12), the North Half of the North Half ($N\frac{1}{2}N\frac{1}{2}$), the Southwest Quarter of the Northwest Quarter ($SW\frac{1}{4}NW\frac{1}{4}$), the South Half of the Southeast Quarter ($S\frac{1}{2}SE\frac{1}{4}$), of Section Fourteen (14), except Thirteen and Fifteen Hundredths (13.15) acres of land from Lots Three (3), Seven (7), and Eight (8), of said Section Fourteen (14) known as Turner Park as described in Deed of Dedication dated March 3, 1931, recorded in Book 25 at Page 438 on March 5, 1931, in the records of Toole County, Montana, Lots One (1), Two (2), Southeast Quarter of the Northeast Quarter ($SE\frac{1}{4}NE\frac{1}{4}$), Southwest Quarter ($SW\frac{1}{4}$), West Half of the Southeast Quarter ($W\frac{1}{2}SE\frac{1}{4}$), of Section Fifteen (15), Lots One (1), Two (2), Three (3), Four (4), Seven (7), Eight (8), Ten (10), of Section Twenty-one (21), Lots One (1), Two (2), Three (3), Four (4), Six (6), Seven (7), Eight (8), Nine (9), Ten (10), Northeast Quarter of the Northeast Quarter ($NE\frac{1}{4}NE\frac{1}{4}$), the Northwest Quarter of the Northwest Quarter ($NW\frac{1}{4}NW\frac{1}{4}$) of Section Twenty-two (22), Lots One (1), Two (2), Three (3), Four (4), Five (5), the Northeast Quarter ($NE\frac{1}{4}$), the North Half of the Southwest Quarter ($N\frac{1}{2}SW\frac{1}{4}$), of Section Twenty-three (23), Lots One (1), Two (2), Three (3), Four (4), Five (5), Six (6), Seven (7), Eight (8), Nine (9), the Southwest Quarter of the Northeast Quarter

(SW $\frac{1}{4}$ NE $\frac{1}{4}$), the South Half of the Northwest Quarter (S $\frac{1}{2}$ NW $\frac{1}{4}$), the North Half of the Southwest Quarter (N $\frac{1}{2}$ SW $\frac{1}{4}$), the Southeast Quarter of the Southwest Quarter (SE $\frac{1}{4}$ SW $\frac{1}{4}$), the West Half of the Southeast Quarter (W $\frac{1}{2}$ SE $\frac{1}{4}$) of Section Twenty-four (24), the Northeast Quarter of the Northwest Quarter (NE $\frac{1}{4}$ NW $\frac{1}{4}$) of Section Twenty-five (25), the North Half of the Southeast Quarter (N $\frac{1}{2}$ SE $\frac{1}{4}$), the Southeast Quarter of the Southeast Quarter (SE $\frac{1}{4}$ SE $\frac{1}{4}$) of Section Twenty-six (26), all in Township Thirty (30) North, Range Three (3) East, Montana Principal Meridian, Lots One (1), Two (2), Three (3), Four (4), the South Half of the North Half (S $\frac{1}{2}$ N $\frac{1}{2}$), the South Half (S $\frac{1}{2}$), of Section Three (3), Lots One (1), Two (2), Three (3), Four (4), South Half of the North Half (S $\frac{1}{2}$ N $\frac{1}{2}$), the South Half (S $\frac{1}{2}$), of Section Four (4), Lots One (1), Two (2), Three (3), Four (4), South Half of the North Half (S $\frac{1}{2}$ N $\frac{1}{2}$), the North Half of the Southeast Quarter (N $\frac{1}{2}$ SE $\frac{1}{4}$), the Southeast Quarter of the Southeast Quarter (SE $\frac{1}{4}$ SE $\frac{1}{4}$), of Section Five (5), Lot One (1) of Section Six (6), the Northeast Quarter (NE $\frac{1}{4}$), the Northeast Quarter of the Northwest Quarter (NE $\frac{1}{4}$ NW $\frac{1}{4}$), of Section Eight (8), the North Half (N $\frac{1}{2}$), the Northeast Quarter of the Southeast Quarter (NE $\frac{1}{4}$ SE $\frac{1}{4}$), of Section Nine (9), the Northeast Quarter (NE $\frac{1}{4}$), the North Half of the Southeast Quarter (N $\frac{1}{2}$ SE $\frac{1}{4}$), the Southwest Quarter of the Southeast Quarter (SW $\frac{1}{4}$ SE $\frac{1}{4}$), of Section Ten (10), the West Half of the Southwest

Quarter ($W\frac{1}{2}SW\frac{1}{4}$) of Section Eleven (11), Lot One (1) of Section Fifteen (15), the North Half of the Southeast Quarter ($N\frac{1}{2}SE\frac{1}{4}$) of Section Seventeen (17), Lots Four (4), Five (5), Six (6), Seven (7), Eight (8), Nine (9), Twelve (12), the Southeast Quarter of the Northeast Quarter ($SE\frac{1}{4}NE\frac{1}{4}$) of Section Nineteen (19), Lots One (1), Two (2), Four (4), Five (5), Six (6), Seven (7), Eight (8), Nine (9), the Southwest Quarter of the Northeast Quarter ($SW\frac{1}{4}NE\frac{1}{4}$), the East Half of the Southwest Quarter ($E\frac{1}{2}SW\frac{1}{4}$), the Southwest Quarter of the Southwest Quarter ($SW\frac{1}{4}SW\frac{1}{4}$), the West Half of the Southeast Quarter ($W\frac{1}{2}SE\frac{1}{4}$) of Section Twenty (20), Lots Four (4), Five (5), Six (6), Seven (7), Eight (8), the West Half of the Northeast Quarter ($W\frac{1}{2}NE\frac{1}{4}$), the Southeast Quarter of the Northwest Quarter ($SE\frac{1}{4}NW\frac{1}{4}$), the Northwest Quarter of the Northwest Quarter ($NW\frac{1}{4}NW\frac{1}{4}$), the Southeast quarter of the Southwest Quarter ($SE\frac{1}{4}SW\frac{1}{4}$), of Section Twenty-one (21), Lots Two (2), Three (3), Four (4), Five (5), the Northeast Quarter of the Northwest Quarter ($NE\frac{1}{4}NW\frac{1}{4}$) of Section Twenty-two (22), the West Half of the East Half ($W\frac{1}{2}E\frac{1}{2}$) of Section Twenty-six (26), the Northeast Quarter of the Northeast Quarter ($NE\frac{1}{4}NE\frac{1}{4}$) of Section Thirty (30), all in Township Thirty (30) North, Range Four (4) East, Montana Principal Meridian, the West Half of the Southwest Quarter ($W\frac{1}{2}SW\frac{1}{4}$), the Southeast Quarter of the Southwest Quarter ($SE\frac{1}{4}SW\frac{1}{4}$), the Southwest Quarter of the Southeast Quarter ($SW\frac{1}{4}SE\frac{1}{4}$), of

Section Twenty-nine (29) Lots One (1), Two (2), the Southeast Quarter of the Northwest Quarter ($SE\frac{1}{4}NW\frac{1}{4}$), the Southeast Quarter of the Northeast Quarter ($SE\frac{1}{4}NE\frac{1}{4}$), the Southeast Quarter of the Southwest Quarter ($SE\frac{1}{4}SW\frac{1}{4}$), the Southwest Quarter of the Southeast Quarter ($SW\frac{1}{4}SE\frac{1}{4}$), the East Half of the Southeast Quarter ($E\frac{1}{2}SE\frac{1}{4}$), of Section Thirty (30), the Northeast Quarter ($NE\frac{1}{4}$) of Section Thirty-one (31), the North Half ($N\frac{1}{2}$) the North Half of the South Half ($N\frac{1}{2}S\frac{1}{2}$), the South Half of the Southwest Quarter ($S\frac{1}{2}SW\frac{1}{4}$), the Southwest Quarter of the Southeast Quarter ($SW\frac{1}{4}SE\frac{1}{4}$), of Section Thirty-two (32), the Southwest Quarter of the Northeast Quarter ($SW\frac{1}{4}NE\frac{1}{4}$), the Southwest Quarter of the Northwest Quarter ($SW\frac{1}{4}NW\frac{1}{4}$), the South Half ($S\frac{1}{2}$), of Section Thirty-three (33), the Southeast Quarter of the Northeast Quarter ($SE\frac{1}{4}NE\frac{1}{4}$), the East Half of the Southeast Quarter ($E\frac{1}{2}SE\frac{1}{4}$), the West Half of the Southwest Quarter ($W\frac{1}{2}SW\frac{1}{4}$), the Southeast Quarter of the Southwest Quarter ($SE\frac{1}{4}SW\frac{1}{4}$) of Section Thirty-four (34), the West Half of the Northwest Quarter ($W\frac{1}{2}NW\frac{1}{4}$) of Section Thirty-five (35), all in Township Thirty-one (31) North, Range Four (4) East, Montana Principal Meridian, containing Eight Thousand Eight Hundred Eighty-six and Seventy-nine Hundredths (8886.79) acres more or less.

Land Situated in Liberty County, Montana
Description

Parcel No. 11:

The West Half ($W\frac{1}{2}$) of Section Ten (10), Township Thirty (30) North, Range Four (4) East, Montana Principal Meridian, containing Three Hundred Twenty (320) acres, more or less, and located in Liberty County, Montana.
Land Situated in Toole County, Montana.

Description

Parcel No. 27:

Lot Four (4) of Section Seventeen (17), Lots Nine (9), Ten (10), the Northwest Quarter of the Southeast Quarter ($NW\frac{1}{4}SE\frac{1}{4}$) of Section Nineteen (19), Lots Three (3), Four (4), Eight (8), Eleven (11), Twelve (12), the Northwest Quarter of the Southeast Quarter ($NW\frac{1}{4}SE\frac{1}{4}$) of Section Twenty (20), all in Township Thirty (30) North, Range Three (3) East, Montana Principal Meridian, containing Two Hundred Ninety-seven and Ninety-eight Hundredths (297.98) acres, more or less, and located in Toole County, Montana.

Land Situated in Toole County, Montana
Description

Parcel No. 28:

The Southeast Quarter of the Northeast Quarter ($SE\frac{1}{4}NE\frac{1}{4}$), the East Half of the Southeast Quarter ($E\frac{1}{2}SE\frac{1}{4}$), of Section Fourteen

(14), the North Half of the Northeast Quarter ($N\frac{1}{2}NE\frac{1}{4}$) of Section Twenty-three (23), Township Thirty (30) North, Range Two (2) East, Montana Principal Meridian, Lots Six (6) and Twelve (12) of Section Nineteen (19), Township Thirty (30) North, Range Three (3) East, Montana Principal Meridian, containing Two Hundred Sixty-two and Six Hundredths (262.06) acres more or less, and located in Toole County, Montana.

Land Situated in Toole County, Montana
Description

Parcel No. 29:

Lots One (1), Two (2), Four (4), Five (5), Six (6), Eight (8), the Southeast Quarter of the Southeast Quarter ($SE\frac{1}{4}SE\frac{1}{4}$) of Section Twenty-three (23), Lots One (1), Two (2), Three (3), Four (4), Six (6), Seven (7), Eight (8), the Southeast Quarter of the Northeast Quarter ($SE\frac{1}{4}NE\frac{1}{4}$), the Northwest Quarter of the Southwest Quarter ($NW\frac{1}{4}SW\frac{1}{4}$), of Section Twenty-four (24), all in Township Thirty (30) North, Range Two (2) East, Montana Principal Meridian, Lot Five (5) of Section Nineteen (19), Township Thirty (30) North, Range Three (3) East, Montana Principal Meridian, containing Five Hundred Forty-nine and Seventy-two Hundredths (549.72) acres, more or less, and located in Toole County, Montana.

Land Situated in Toole County, Montana
Description

Parcel No. 31:

Lots One (1), Four (4), Five (5), Six (6), the North Half of the Southeast Quarter ($N\frac{1}{2}SE\frac{1}{4}$), of Section Twenty (20), Lots Three (3), Four (4), Five (5), Six (6), Seven (7), Eight (8), Nine (9), the Northeast Quarter of the Southeast Quarter ($NE\frac{1}{4}SE\frac{1}{4}$), of Section Twenty-one (21), Lots One (1), Two (2), Three (3), Four (4), Five (5), Six (6), Seven (7), the South Half of the Northeast Quarter ($S\frac{1}{2}NE\frac{1}{4}$), the Northeast Quarter of the Northwest Quarter ($NE\frac{1}{4}NW\frac{1}{4}$), the Northwest Quarter of the Southwest Quarter ($NW\frac{1}{4}SW\frac{1}{4}$), of Section Twenty-two (22), Lot Seven (7), the South Half of the Northwest Quarter ($S\frac{1}{2}NW\frac{1}{4}$), of Section Twenty-three (23), all in Township Thirty (30) North, Range Two (2) East, Montana Principal Meridian, containing Eight Hundred Ninety-four and Ninety Hundredths (894.90) acres, more or less, and located in Toole County, Montana.

[Endorsed]: Filed May 24, 1955.

[Title of District Court and Cause.]

NOTICE

To: C. A. Kolstad, Also Known as Clarence A. Kolstad, and Alta A. Kolstad, Husband and

Wife; Amerada Petroleum Corporation, a Corporation; Robert C. Balsam and Mary F. Balsam, His Wife; Frank H. Wasson and ——— Wasson, His Wife, If Any; G. A. Thiel and ——— Thiel, His Wife, If Any; Lila Jane MacGowan, a Feme Sole; G. W. Kolstad, a Single Man; Nick Laas, Executor of the Estate of Martin Wasesha, Deceased; Thomas F. Wallace and ——— Wallace, His Wife, If Any; Wells-Dickey Company, a Corporation; Clarence I. Underdal and Ruth Underdal, His Wife; Isaac R. Denson and Mary O. Denson, His Wife; Great Falls National Realty Company, a Corporation; Isa E. Denson, a Feme Sole; Toole County, a Political Subdivision of the State of Montana; Helen L. Purdy, a Feme Sole; Shadrach P. Denson and Antoinette G. Denson, His Wife; Isa E. Denson, Executrix, and Norman M. Denson, Executor of the Estate of Mayette E. Denson, Deceased; Isa E. Denson, Norman M. Denson, Shadrach P. Denson, and Mayette E. Denson, Jr., Heirs of Mayette E. Denson, Deceased; the Unknown Heirs and Creditors of Mayette E. Denson, Deceased; Marias River Electric Cooperative, Incorporated, a Cooperative; The Great Falls National Bank, a Corporation; Alton L. Knutson, a Single Man; W. Coburn Cook and Ruth E. Cook, Husband and Wife; W. E. Buell and ——— Buell, His Wife, If Any; and the County of Liberty, a Political Subdivision of the State of Montana.

You are hereby notified that a Complaint in condemnation has heretofore been filed in the office of the Clerk of the above-named Court in an action to condemn certain property described in Schedule A attached hereto and made a part hereof, for use in connection with the Tiber Dam and Reservoir, Lower Marias Unit, Missouri River Basin Project.

The authority for the taking is the Act of June 17, 1902, and all acts amendatory thereof or supplementary thereto (32 Stat. 388, 43 U.S.C., 1946 ed., sec. 371, et seq.); Act of August 1, 1888 (25 Stat. 357, 40 U.S.C., 1946 ed., Supp. V, sec. 257), as amended; Act of February 26, 1931 (46 Stat. 1421, 40 U.S.C., 1946 ed., secs. 258a-258e), and acts amendatory thereof or supplemental thereto; Section 9 of the Act of December 22, 1944 (58 Stat. 887, 891); Section 2 of Reorganization Plan No. 3 of 1950 (15 F.R. 3174); Section 28 of Order No. 2509, as amended (17 F.R. 6794); Interior Department Appropriation Act, 1955 (68 Stat. 361, 365); and, Declaration of Taking dated April 27th, 1955, and filed herein.

The estate to be acquired in the property described in Schedule A hereto attached is the absolute fee simple title thereto, including all improvements, excepting however, and reserving to the owners thereof, their heirs and assigns, all oil, gas and other minerals except sand, gravel and other materials used in the construction of the Lower Marias Unit, together with the right to prospect for, mine and remove the same, but any rights exercised

under such reservations shall be exercised in such a manner as not to interfere with the construction, operation and maintenance of the Tiber Dam and Reservoir as may be determined by the United States, acting through the Secretary of the Interior or his duly authorized representative. It is understood that miner-like methods shall be employed in the extraction and removal of any such oil, gas and other minerals, and that all necessary precautions shall be taken to prevent the pollution of water stored in the said Tiber Reservoir or flowing in the Marias River and it is also understood that no pollution from such operations shall affect the quality of such water for irrigation, municipal or miscellaneous uses, and the determination of the Secretary of the Interior or his duly authorized representative, acting for and on behalf of the United States with respect thereto, shall be final and conclusive. Any operations under said reservation by the owner thereof, his heirs, assignees or lessees, shall be at their sole risk.

You are further notified that the persons having or claiming an interest, or who may have or may claim an interest in the property described in Schedule A hereto attached whose names are ascertainable by a reasonably diligent search of the records, and those whose names have been otherwise learned, are:

Parcel No. 10

C. A. Kolstad, also known as Clarence A. Kolstad, and Alta A. Kolstad, husband and wife; Amerada

Petroleum Corporation, a corporation; Robert C. Balsam and Mary F. Balsam, his wife; Frank H. Wasson and ——— Wasson, his wife, if any; G. A. Thiel and ——— Thiel, his wife, if any; and, Lila Jane MacGowan, a feme sole.

Parcel No. 11

G. W. Kolstad, a single man; Amerada Petroleum Corporation, a corporation; Nick Laas, Executor of the Estate of Martin Wasesha, deceased; Thomas F. Wallace and ——— Wallace, his wife, if any; and, Wells-Dickey Company, a corporation.

Parcel No. 27

Clarence I. Underdal and Ruth Underdal, his wife; Isaac R. Denson and Mary O. Denson, his wife; and, Great Falls National Realty Company, a corporation.

Parcel No. 28

Isa E. Denson, a feme sole; Toole County, a political subdivision of the State of Montana; and, Helen L. Purdy, a feme sole; and Shadrach P. Denson and Antoinette G. Denson, his wife.

Parcel No. 29

Isa E. Denson, Executrix, and Norman M. Denson, Executor of the Estate of Mayette E. Denson, deceased; Isa E. Denson, a feme sole; Shadrach P. Denson and Antoinette G. Denson, his wife; Isa E. Denson, Norman M. Denson, Shadrach P. Denson, and Mayette E. Denson, Jr., heirs of Mayette E.

Denson, deceased; the unknown heirs and creditors of Mayette E. Denson, deceased; Marias River Electric Cooperative, Incorporated, a cooperative; and, The Great Falls National Bank, a corporation.

Parcel No. 31

Alton L. Knutson, a single man; Toole County, a political subdivision of the State of Montana; W. Coburn Cook and Ruth E. Cook, husband and wife; and, W. E. Buell and ——— Buell, his wife, if any.

The County of Liberty, State of Montana, and the County of Toole, State of Montana, may have or may claim an interest in the property by reason of taxes and assessments due and exigible.

You are further notified that if you have any objections or defenses to the taking of this property, you are required to serve upon plaintiff's attorney at the address herein designated within twenty (20) days after service of this notice, exclusive of the day of service, an answer identifying the property in which you claim to have an interest, stating the nature and extent of the interest claimed, and stating all your objections and defenses to the taking of this property. Failure so to serve an answer shall constitute consent to the taking of this property and to the authority of the Court to proceed to hear the action and to fix the just compensation, and shall constitute a waiver of all defenses and objections not so presented.

You are further notified that if you have no objection or defense to the taking, you may serve upon

plaintiff's attorney a notice of appearance designating the property in which you claim to be interested, and thereafter you shall receive notice of all proceedings affecting the said property.

Trial by jury of the issue of just compensation is demanded by plaintiff. You are further notified that at the trial of issue of just compensation, whether or not you have answered or served a notice of appearance, you may present evidence as to the amount of the compensation to be paid for the property in which you have any interest, and you may share in the distribution of the award of compensation.

Dated this 24th day of May, 1955.

KREST CYR,

United States Attorney for the
District of Montana;

/s/ DALE F. GALLES,

Assistant United States Attorney for the District of
Montana.

Schedule A

[Schedule A attached to the foregoing is identical to Schedule A attached to the Complaint. See pages 8 to 15.]

Returns on Service of Writs attached.

[Endorsed]: Filed June 3, 1955.

[Title of District Court and Cause.]

ORDER FOR DELIVERY OF POSSESSION

This action coming on for hearing (ex parte) upon motion of plaintiff for an order for the surrender of possession of the property described in the Complaint filed herein to plaintiff, and it appearing that plaintiff is entitled to possession of the said property,

It Is This Day Ordered that all defendants to this action and all persons in possession and control of the property described in the Complaint filed herein and further described in the Notice of condemnation to be served on all such parties, shall surrender possession of the said property immediately, to the extent of the estate being condemned by the United States, as set forth in said Notice of Condemnation.

It Is Further Ordered that a copy of this order shall be served forthwith on all persons in possession or control of said property and that the Notice of Condemnation shall be served simultaneously with said copy of this Order upon all persons in possession or control of the property described.

Dated this 24th day of May, 1955.

/s/ W. D. MURRAY,

United States District Judge.

Returns on Service of Writs attached.

[Endorsed]: Filed and entered June 3, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEARANCE

To The United States of America, and to Mr. Krest Cyr, United States Attorney for the District of Montana, and to Mr. Dale F. Galles, Assistant United States Attorney for the District of Montana.

You are hereby notified that we the undersigned, Clarence A. Kolstad and Alta A. Kolstad of Chester, Montana, do hereby make our appearance in the above action.

That we are the owners of the land described in said action as parcels ten and eleven of schedule A, which description is hereto attached.

That we are not satisfied with the money offered for this land as it is far below the present values in the community.

We ask that you notify us of all proceedings affecting this property.

Dated this 14th day of June, 1955.

/s/ CLARENCE A. KOLSTAD,

/s/ ALTA A. KOLSTAD.

Schedule A

[Schedule A, parcels ten and eleven, are identical to Schedule A attached to the Complaint, see pages 8 to 15.]

[Endorsed]: Filed June 14, 1955.

[Title of District Court and Cause.]

DEFICIENCY JUDGMENT

The plaintiff having filed its Complaint herein and defendants C. A. Kolstad, also known as Clarence A. Kolstad, and Alta A. Kolstad, husband and wife, having been served with process as is required by law and having thereafter appeared at the time set for trial of the issue of just compensation as to Parcels 10 and 11 on January 17, 1957, with their attorneys of record, and there having alleged they were the owners of the land described as Parcels No. 10 and 11 more particularly described in Schedule A hereto attached and by reference made a part hereof, which said parcels were taken and condemned by the United States of America for use in connection with the Tiber Dam and Reservoir, Lower Marias Unit, Missouri River Basin Project; all other parties and persons named in the Complaint as defendants and having a possible interest in the lands described as Parcels No. 10 and 11 were duly served with process, but all of said parties and persons failed to appear herein and the default of all such parties and persons having been duly entered; and thereafter the case against said above-named defendants having been set for trial as to the issue of just compensation to be paid for the lands belonging to said defendants; and the Court having ordered the trial of Parcels No. 10 and 11 involved herein segregated from the remaining parcels for trial; and a jury having been duly em-

paneled and sworn on the 12th day of December, 1956, and said trial having been recessed and resumed on January 17, 1957, to try the issues in said cause as to Parcels No. 10 and 11, and after hearing the testimony of witnesses for the plaintiff and the defendants, and after arguments of counsel and instructions of the Court, the jury did retire for deliberation, and after deliberating did on the 21st day of January, 1957, return into this Court three (3) verdicts in words and figures as follows:

“We, the jury duly empaneled and sworn in this cause, hereby award the defendant Clarence A. Kolstad, as just compensation in this cause the sum of two hundred thirty and two thousand seven hundred thirty dollars (\$232,730.00) for the taking of this land.

“R. V. UMSTED,
“Foreman.

“We, the jury duly empaneled and sworn in this cause, hereby award the defendants Clarence A. Kolstad and Alta A. Kolstad, jointly, in this cause as just compensation the sum of one hundred ninety-one thousand twenty-four dollars (\$191,024.00) for the taking of their land.

“R. V. UMSTED,
“Foreman.

“We, the jury duly empaneled and sworn in this cause, hereby award the defendant Alta A. Kolstad as just compensation in this cause the sum of ninety-

six thousand nine hundred ninety-two dollars (\$96,992.00) for the taking of her land.

“R. V. UMSTED,
“Foreman.”

And It Appearing to the Court that defendants C. A. Kolstad, also known as Clarence A. Kolstad, and Alta A. Kolstad, husband and wife, are the former owners of the lands described as Parcels No. 10 and 11 more particularly described in Schedule A hereto attached and by reference made a part hereof,

And It Further Appearing to the Court that heretofore and simultaneously with the filing of the Declaration of Taking and Complaint in condemnation in this cause on the 24th day of May, 1955, the United States of America deposited into the Registry of this Court the following sums for the taking of the respective parcels belonging to the above-named defendants, and for the use and benefit of the persons entitled thereto:

Parcel No.	Amount Deposited
10	\$226,849.20
11	6,800.00

Now, Therefore, the Court being fully advised in the premises, and by reason of the verdicts of the jury,

It Is Hereby Ordered, Adjudged and Decreed that the just compensation for the taking of the respective property of C. A. Kolstad, Alta A. Kol-

stad and C. A. Kolstad and Alta A. Kolstad, jointly, being Parcels No. 10 and 11, is the sum of \$520,-746.00.

It Is Further Ordered, Adjudged and Decreed that the plaintiff deposit into the Registry of the Court the sum of two hundred eighty-seven thousand ninety-six and 80/100 (\$287,096.80) dollars, being the difference between the amounts heretofore deposited and the amounts of just compensation fixed by this judgment, with interest at the rate of six per cent (6%) per annum from May 24, 1955, until said sum is paid into the Registry of the Court.

It Is Further Ordered, Adjudged and Decreed that all monies deposited herein and to be deposited pursuant to this judgment be subject to disbursement as provided for by further order of this Court.

Dated this 26th day of January, 1957.

/s/ W. D. MURRAY,
United States District Judge.

Schedule A

[Schedule A, parcels ten and eleven, are identical to Schedule A attached to the Complaint, see pages 8 to 15.]

[Endorsed]: Filed January 26, 1957.

Entered and noted January 28, 1957.

[Title of District Court and Cause.]

FINAL JUDGMENT IN CONDEMNATION
AND ORDER DISBURSING FUNDS

This case having been brought by the filing of a Complaint and the defendants above named, and each of them, having been served with process as required by law, and defendants Clarence A. Kolstad and Alta A. Kolstad, his wife, having appeared at the time set for the trial with their attorneys of record, and all other defendants, and each of them herein, having defaulted, and their defaults having been duly entered, notice of trial of this cause was issued by the Clerk and given to the appearing defendants as provided by law; and thereafter the case against said above-named defendants having been set for trial as to the issue of just compensation to be paid for the lands belonging to said defendants; and the Court having ordered the trial of Parcels No. 10 and 11 involved herein segregated from the remaining parcels for trial; and a jury having been duly empaneled and sworn on the 12th day of December, 1956, and said trial having been recessed and resumed on January 17, 1957, to try the issues in said cause as to Parcels 10 and 11; said jury returned its verdicts on the 21st day of January, 1957, awarding the defendants as just compensation in this cause the sum of \$520,746.00.

And It Further Appearing that defendants Clarence A. Kolstad and Alta A. Kolstad, his wife, are the former owners of the lands described as Parcels

No. 10 and 11 more particularly described in Schedule A hereto attached and by reference made a part hereof, and are the only persons entitled to payment of compensation therefor,

And It Further Appearing to the Court that heretofore and simultaneously with the filing of the Declaration of Taking and Complaint in condemnation in this cause on May 24, 1955, the United States of America deposited into the Registry of this Court the following sums for the taking of the respective parcels belonging to the above-named defendants, and for the use and benefit of the persons entitled thereto:

Parcel No. 10.....\$226,849.20

Parcel No. 11..... 6,800.00

that pursuant to the verdicts of the jury as to Parcels 10 and 11 a deficiency judgment was entered on January 28, 1957, whereby the sum of \$287,096.80 with interest thereon at the rate of 6% per annum from May 25, 1955, until said sum is paid into the Registry of the Court, was ordered to be paid into the Registry of the Court.

And It Further Appearing that the sum of \$287,-096.80, representing the amount of the deficiency judgment as to Parcels No. 10 and 11 was paid into the Registry of the Court on March 5, 1957, with interest thereon as above stated,

Now, Therefore, upon motion of Krest Cyr, United States Attorney for the District of Montana, and Dale F. Galles, Assistant United States Attor-

ney for the District of Montana, attorneys for the plaintiff herein, for entry of a Final Judgment in Condemnation and Order Disbursing Funds herein, and the Court being fully advised in the premises,

It Is Ordered, Adjudged and Decreed that the full and complete just compensation for the taking of the property of the defendants Clarence A. Kolstad and Alta A. Kolstad, his wife, more fully described in Schedule A hereto attached and by reference made a part hereof, is the sum of \$520,746.00.

It Is Further Ordered, Adjudged and Decreed that there is vested in the United States of America the following estates: The estate to be acquired in the property described in Schedule A hereto attached and by reference made a part hereof is the absolute fee simple title thereto, including all improvements, excepting however, and reserving to the owners thereof, their heirs and assigns, all oil, gas and other minerals except sand, gravel and other materials used in the construction of the Lower Marias Unit, together with the right to prospect for, mine and remove the same, but any rights exercised in such a manner as not to interfere with the construction, operation and maintenance of the Tiber Dam and Reservoir as may be determined by the United States, acting through the Secretary of the Interior or his duly authorized representative. It is understood that miner-like methods shall be employed in the extraction and removal of any such oil, gas and other minerals, and that all necessary precautions shall be taken to prevent the pollution

of water stored in the said Tiber Reservoir or flowing in the Marias River and it is also understood that no pollution from such operations shall affect the quality of such water for irrigation, municipal or miscellaneous uses, and the determination of the Secretary of the Interior or his duly authorized representative, acting for and on behalf of the United States with respect thereto, shall be final and conclusive. Any operations under said reservation by the owner thereof, his heirs, assignees or lessees, shall be at their sole risk.

It Is Further Ordered, Adjudged and Decreed that the lands hereinabove described are condemned for the public use, to wit: For use in connection with the Tiber Dam and Reservoir, Lower Marias Unit, Missouri River Basin Project.

It Is Further Ordered, Adjudged and Decreed that the sum of \$551,422.10 now on deposit in the Registry of the Court for the taking of Parcels No. 10 and 11 involved herein be disbursed to Clarence A. Kolstad and Alta A. Kolstad, his wife, c/o Wiggenhorn, Hutton, Schiltz and Sheehy, Attorneys at Law, Electric Building, Billings, Montana, and the Clerk will make distribution accordingly.

Dated this 7th day of March, 1957.

/s/ W. D. MURRAY,

United States District Judge.

Schedule A

[Schedule A, parcels ten and eleven, are identical to Schedule A attached to the Complaint, see pages 8 to 15.]

[Endorsed]: Filed and entered March 8, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Clarence A. Kolstad and Alta A. Kolstad, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in the above-entitled action on the 7th day of March, 1957.

Dated this 18th day of April, 1957.

WIGGENHORN, HUTTON,
SCHILTZ & SHEEHY,

By /s/ JOHN M. SCHILTZ,
Attorneys for Appellants.

[Endorsed]: Filed April 19, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Clarence A. Kolstad and Alta A. Kolstad, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the judgment designated as

Deficiency Judgment made and entered in the above-entitled action on the 26th day of January, 1957.

Dated this 22nd day of April, 1957.

WIGGENHORN, HUTTON,
SCHILTZ & SHEEHY,

By /s/ R. G. WIGGENHORN,
Attorneys for Appellants.

[Endorsed]: Filed April 22, 1957.

[Title of District Court and Cause.]

STIPULATION FOR DISMISSAL OF APPEAL

The plaintiff having appealed to the United States Court of Appeals for the Ninth Circuit from the Deficiency Judgment of this Court entered on January 8, 1957, as to Parcels Nos. 27, 28, 29 and 31 of the above-entitled action, by Notice of Appeal filed March 7, 1957, and the appeal not yet having been docketed in the Court of Appeals, the parties stipulate pursuant to Rule 73(a) of the Federal Rules of Civil Procedure, that the appeal is hereby dismissed, subject to the approval of this Court.

Dated this 17th day of May, 1957.

KREST CYR,
United States Attorney for the
District of Montana;

By DALE F. GALLES,
Assistant United States Attorney, Attorneys for
Plaintiff.

SWANBERG & SWANBERG,
RAY F. KOBY,
CARTER WILLIAMS,

By RANDALL SWANBERG,
Attorney for Defendant Owners of Parcels Nos. 27,
28, 29 and 31.

Approved:

W. D. MURRAY,
United States District Judge.

Attest: A True Copy.

[Seal] E. WARREN TOOLE,
Clerk;

By /s/ ELIZABETH C. McKEE,
Deputy.

[Endorsed]: Filed May 21, 1957.

[Title of District Court and Cause.]

MOTION TO SET ASIDE JUDGMENT

Clarence A. Kolstad, also known as C. A. Kolstad, and Alta A. Kolstad, Defendants, in the above-entitled action, move the Court for an Order setting aside the Judgment in this case and permitting them to introduce evidence on the issue of just compensation upon the following grounds:

On March 7th, 1957, Judgment was entered in the above-entitled cause against these Defendants; the case was tried on the theory of three separate owner-

ships when in truth and in fact, the property was owned by these defendants as tenants in partnership; that through surprise, mistake and excusable neglect, these defendants were unable to show this ownership; that since the entry of Judgment, these defendants have discovered new evidence. The Motion will be further based on the affidavit of C. A. Kolstad, evidence to be introduced at the hearing on the Motion, and on the records and files in the above-entitled action.

CEDOR B. ARONOW &
ELMO J. CURE,

By /s/ ELMO J. CURE,
Attorneys for Defendants.

[Endorsed]: Filed November 4, 1957.

[Title of District Court and Cause.]

AFFIDAVIT

State of Montana,
County of Toole—ss.

C. A. Kolstad, also known as Clarence A. Kolstad, being first duly sworn, upon oath, deposes and says:

That he is one of the defendants in the above-entitled action and the husband of the defendant, Alta A. Kolstad, whose maiden name was Alta A. Worden.

That this action was tried on the 17th day of January, 1957, at Havre, Montana, and Judgment was entered in favor of the Plaintiff and against the Defendants for the condemnation of the lands described in Plaintiff's Complaint and the Defendants, C. A. Kolstad and Alta A. Kolstad, were awarded the sum of \$551,422.10 as just compensation for the lands taken including severance damages to the lands remaining.

Since the entry of said Judgment, Deponent has discovered certain new evidence which evidence could not have been discovered at the time of the trial of said cause as will more fully appear as set forth hereinafter together with the description of the evidence newly discovered.

That your Deponent and Alta A. Kolstad were married on the 7th day of June, 1931, and began working towards the establishment of a partnership between themselves in the farming and ranching business; that prior to said marriage, the defendant, Alta A. Kolstad, then known as Alta Ann Worden, taught school and during the years that she taught school, she had saved various sums of money some of which was deposited in the Securities Savings and Loan Association of Billings, Montana, and some in postal savings, a statement from Security Building and Loan Association showing deposits and withdrawals is attached hereto marked Exhibit "1" and made a part of this affidavit; that during the first years of your deponent's marriage, he was Under-Sheriff of Liberty County, Montana, and

farmed a small amount of acreage; that the defendant, Alta A. Kolstad, withdrew the funds which she had in savings, both Building and Loan and Postal savings, and made them available for the joint use of your Deponent and the Defendant, Alta A. Kolstad, which money was used to purchase farm machinery and farm lands and the proceeds from the joint farming operations of the Deponent and his wife as well as the money that the defendant, Alta A. Kolstad, had in savings, were used to purchase lands in the name of Alta A. Kolstad until the land owned by the Defendant, Alta A. Kolstad, approximately equaled the land owned by your Deponent; and, thereafter, your Deponent and his wife, operated their farm lands on a partnership basis and it was the intention of the Deponent and his wife, Alta A. Kolstad, that all of the lands purchased by them should be owned by them as tenants in partnership, and thereafter they operated as partners and each one filed a separate income tax return until the year 1943 when the parties hereto filed a partnership return because of their joint operations and all land standing in the name of C. A. Kolstad individually or Alta A. Kolstad individually, or jointly by the two of them, was all considered as jointly owned and partnership property; depreciation schedules were taken in the partnership income tax returns on machinery, buildings, improvements including fences, casing in water wells whether located on land standing in the individual names of your deponent or Alta A. Kolstad, or the two of them jointly as if all lands were owned jointly and

all property was owned jointly by the partnership consisting of your deponent and his wife, Alta A. Kolstad, and all of the lands were treated as one unit belonging to the partnership and no segregation of grain grown was made but all proceeds were deposited to the partnership account in the Citizen's Bank of Montana at Havre, Montana. A letter from Citizen's Bank of Montana showing the opening of the partnership account is attached hereto marked Exhibit "2" and made a part of this affidavit; that subsequent to 1943 and prior to 1956, the Internal Revenue Department of the United States checked the partnership returns of your deponent and his wife, Alta A. Kolstad, and found nothing wrong in their method of handling the property and the income therefrom as partnership assets and found that each had equal interest and equity in the land operated and considered owned by the partnership; that your Deponent was told by Internal Revenue men who examined the partnership accounts that the reason for the examination was the decision in *Commissioner v. Culbertson*, 337 U.S. 733; 69 S. Ct. 1210, and that your deponent and his wife, Alta A. Kolstad, had a true partnership and not a family partnership.

All of the taxes and insurance premiums on the lands and buildings, on all of the lands whether standing in the individual names of Deponent and his wife, or in their names jointly, were paid from the partnership bank account; at no time was any rent paid to an individual partner in whose name

the land stood for the use of the land by the partnership. Attached hereto and made a part of this affidavit and marked Exhibit "3" is a letter from the accounting firm of Finley, Renman & Misfeldt, Certified Public Accountants of Great Falls, Montana, who have looked after your Deponent's income tax and audited his books for a number of years and which letter points out that there has been a partnership operation and intention to own the lands involved in this action in a partnership between your Deponent and his wife, Alta A. Kolstad, and such funds awarded in this action when accepted by your Deponent and his wife, Alta A. Kolstad, are to be deposited to the partnership account.

That on or about January 4, 1943, your affiant made a down payment to the Federal Land Bank of Spokane to purchase what is known as the Washesha Ranch from funds made available by the Citizen's State Bank of Havre through the First State Bank of Chinook as the proceeds of a loan on wheat belonging jointly to C. A. Kolstad and Alta A. Kolstad, the title to which ranch was taken in the individual name of C. A. Kolstad but it was the intention of the parties that this ranch be owned by the partnership.

That thereafter, in the early part of 1943, your affiant negotiated with John Sailer for the purchase of the Sailer Ranch and a contract was entered into, and that thereafter, upon the examination of the abstracts, your affiant on May 15, 1943, wrote

two checks to John Sailer as a down payment for the purchase of the Sailer Ranch, the title to which was taken in the name of Alta A. Kolstad but it was the intention of the parties that this ranch be owned by the partnership. The down payment for the Sailer Ranch and all subsequent payments were made from the joint checking account maintained by C. A. Kolstad and Alta A. Kolstad in the Citizens Bank of Montana at Havre, Montana.

That in the fall of 1945, your affiant negotiated for what is known as "The Turner Ranch," owned by Paul Wolk of Cut Bank, Montana, and on October 8, 1945, your affiant wrote a check upon the Citizens Bank of Montana at Havre, Montana, on the joint checking account maintained by C. A. Kolstad and Alta A. Kolstad for the down payment on the Turner Ranch, the title to which ranch was taken in the joint names of C. A. Kolstad and Alta A. Kolstad, it being the intention of the parties that this ranch be owned by the partnership, and all subsequent payments on the purchase of the Turner Ranch were made from the joint account of the partnership.

That the wife of your affiant has been in ill health for the past few years and approximately a year ago took a turn for the worse and has been constantly under medical and nursing care; that your affiant has had to be away a great deal of the time looking after and trying to alleviate the condition of Alta A. Kolstad and it was impossible for the said defendant, Alta A. Kolstad, to testify at the

trial of the instant action and her being in Havre at the time of the trial had an injurious effect upon her health. A letter from her attending physician is attached hereto marked Exhibit No. "4" and is made a part of this affidavit.

That in the fall of 1952, an oil and gas lease was taken on approximately 9,000 acres of land belonging to the Defendants Kolstad by William B. Chebul as lease broker for Amerada Petroleum Corporation and the bonuses as well as the delay rentals under said oil and gas lease were deposited in the partnership account. A photostatic copy of such oil and gas lease showing the recorded data and the description of the lands leased is attached hereto marked Exhibit No. "5" and made a part of this affidavit. The title examiners for Amerada Petroleum Corporation approved the title on these lands as partnership property in accordance with the intent of the lessors and the defendants herein.

Your Deponent at the time of the trial of the above action was foreclosed from making an offer of proof as to partnership ownership of all of the lands involved as appears more fully in the transcript; that in addition, your Deponent finds that he is faced with a serious income tax problem and the impossibility of segregating the funds on individual ownership of said lands and may be in conflict between the decision of the Court and the holdings of the Internal Revenue Bureau.

Since the year 1953, the Kolstad boys, the sons of your Deponent and his wife, Alta K. Kolstad,

namely, Galen Kolstad, Clark Kolstad and Harley Kolstad, have operated the lands belonging to the partnership between your Deponent and his wife, Alta A. Kolstad, whether such lands stand in the individual names or the joint names of the respective partners, under lease wherein the three sons perform all of the farming operations and supply all of the machinery and remit to the partnership of your deponent and Alta A. Kolstad, two-fifths of the crop grown and harvested on the lands, free of cost, in the nearest elevator or in such storage bins as the partnership may designate. The Kolstad Brothers have been in open and notorious possession of the lands since the year 1953 and as Lessees are necessary and proper parties to this litigation.

That at the trial of the above-entitled action at Havre, Montana, one Joe Meissner who is one of the Meissner Brothers that leased the Kolstad holdings from the years 1947 to 1953, testified as to the production records of said lands. The lease for all of the said lands was given by C. A. Kolstad and Alta A. Kolstad with no distinction as to ownership and all rentals were paid to C. A. Kolstad as business manager for the partnership of himself and his wife, and deposited by him to the partnership bank account, a copy of said lease is attached hereto marked Exhibit No. "6" and by this reference made a part of this affidavit; that the said Joe Meissner testified at the trial of the instant action that he farmed the lands and knew what the production thereof was; that Joe Meissner testified that

in the year 1952, that the yield per acre dropped down to around 13 bushels and that in the year 1953, the production was around 22 bushels per acre; that your affiant made an independent investigation over a period of some two months time at all of the elevators from which your affiant received crop rental checks for the year 1952 and the year 1953 during the time that Meissner Brothers were leasing said lands and finds that in the year 1952, the average yield per acre based upon the number of bushels marketed by Meissner Brothers on which rental was paid to your affiant and his wife amounted to 16 bushels to the acre; that the same investigation was made for the year 1953 and the actual average yield was 24 bushels to the acre instead of 22 as testified by Joe Meissner. Attached to this affidavit and marked Exhibit No. "7" is the acres of crop planted for the years 1952 and 1953 on the Kolstad land by Meissner Brothers certified by the Agricultural Stabilization and Conservation Office at Chester, Montana. Also attached hereto marked Exhibits Nos. "8" and "9" are the elevator statements showing the bushels marketed and the rental paid to Kolstad for the years 1952 and 1953. That all of the above bushels per acre given in this paragraph do not take into account the fact that Meissner Brothers saved out nearly a bushel an acre of wheat for next year's crop seed. It being the custom and the practice to plant between 40 and 50 pounds of wheat to the acre and a bushel of wheat weighs 60 pounds.

That your affiant had no way of knowing that Joe Meissner would give materially incorrect testimony as to the average yield per acre from the Kolstad lands and that affiant could not have by the exercise of reasonable diligence been prepared to meet such erroneous material testimony; that the misstatement of Joe Meissner is material in that it lowered the cash income from said lands during the years 1952 and 1953 by a little over \$21,000.00 and would thus reduce the value of the lands of your deponent and the defendant, Alta A. Kolstad, operated and owned as co-partners because the income received from said lands has a direct and important bearing upon what a willing buyer would pay for such lands in the event of the sale and thus would increase the value of said lands.

That the witness, Joe Meissner, also testified as to the acquisition of some land from one John Brinkman lying some 16 miles southeast of the lands of the defendants Kolstad, which testimony was used by the government to contradict the valuation placed upon the Kolstad lands by your affiant and the defendant's witnesses; that by the exercise of due diligence, your affiant could not and was not able to get such testimony at the time of trial but since has discovered that the transaction between John Brinkman and Meissner Brothers was not an arm's length transaction nor one made upon the open market but was a sale based and the price determined upon friendship rather than the market value; the affidavit of John Brinkman marked Ex-

hibit No. "10" is attached hereto and made a part of this affidavit.

Attached hereto as Exhibit No. "11" is a photostatic copy of the partnership income tax return for the year 1946 and as Exhibit No. "12" is attached the photostatic copy of the partnership income tax return for the year 1954 and by this reference made a part of this affidavit. The income tax returns for the years in between and for the year 1955 indicate as stated above, that all of the improvements on the property whether held in the names of the partners individually or jointly were included on the partnership depreciation schedule.

That before said trial, the Deponent used due diligence to obtain all of the testimony necessary to support the issue on his part; the testimony of Joe Meissner could not be met in any short time and it took your deponent several months to track down the amount of grain sold by Meissner Brothers from the Kolstad holdings and likewise, your deponent had no opportunity to talk to Mr. John Brinkman to inquire as to the land sale between him and Meissner Brothers and that Mr. Brinkman because of his close relationship to Meissner Brothers was reluctant to furnish the affidavit, Exhibit No. "10" until the force and effect of the testimony of Joe Meissner as to the value of the Kolstad holdings was explained to Mr. Brinkman and he readily admitted that the Kolstad lands blocked out as they were in a large unit were better lands and worth

more money than the price that Mr. Brinkman asked Meissner Brothers and Mr. Brinkman realized that his own lands were worth more money than he asked from the Meissner Brothers and that upon the trial, your deponent was unable to produce any witnesses to prove the facts alleged in this affidavit or to testify himself as he did not have the information needed as to some of the things and was not permitted by the Court to testify as to the other matters.

The newly discovered evidence could not by due diligence be discovered in time to move for a new trial under Rule 59 (b) of the Federal Rules of Civil Procedure. The newly discovered evidence has a material bearing upon the issue involved in this case because (1) the Joe Meissner testimony as to a comparable sale as to the land he purchased from John Brinkman reduced the value of the lands of your Deponent and Alta A. Kolstad; (2) the testimony of Joe Meissner as to the amount of production from the lands of the defendants Kolstad during the time that Meissner Brothers had said lands leased did not reflect the true production and materially reduced the value of the lands of these defendants as it reduced the income derived from said lands by some \$21,000.00; (3) that at the trial by proceeding as to three separate tracts of land instead of one large unit of operation, the amount of just compensation and severance damage to the remaining land was greatly reduced to the detriment of your Deponent and his wife, Alta A. Kol-

stad, and (4) that necessary and proper parties were not named and made defendants in the suit.

/s/ C. A. KOLSTAD.

Subscribed and Sworn to before me this 31st day of October, A.D. 1957.

[Seal] /s/ BERNICE DAHL LUTZ,
Notary Public for the State of Montana, Residing
at Shelby, Montana.

My commission expires March 16, 1960.

[Endorsed]: Filed November 4, 1957.

[Title of District Court and Cause.]

RESISTANCE TO MOTION OF DEFENDANTS
CLARENCE A. AND ALTA A. KOLSTAD
FOR AN ORDER SETTING ASIDE THE
JUDGMENT AND FOR NEW TRIAL

Plaintiff above named acting by and through Krest Cyr, United States Attorney, and Dale F. Galles, Assistant United States Attorney, respectfully resists and opposes the motion of defendants Clarence A. Kolstad and Alta A. Kolstad for an order setting aside the judgment in this action and for a new trial.

Separate Ownerships

At the trial of this action in Havre which commenced on December 12, 1956, defendant Clarence

A. Kolstad was the first witness to testify. After he had testified about an hour and in response to his then attorney's questioning, Kolstad stated his wife bought the Sailer ranch, he bought the Washesha ranch and that they jointly bought the Turner ranch. It was at this point that the jury was excused and the Court questioned the evidence as to value of their entire holdings when it was then obvious that there were separate ownerships as testified to by Mr. Kolstad. Thereupon the trial recessed until the next morning when Mr. Ralph G. Wiggenhorn, one of counsel and apparently chief counsel, moved the Court for a continuance to establish and separate the various ownerships of land and to permit the witnesses to prepare for trial under the theory of separate valuations for the separate ownerships. All attorneys and valuation witnesses came to the trial prepared to offer and hear offered evidence of a single value for the aggregate acreage even though under separate ownerships.

At that time the Court allowed Mr. Wiggenhorn one week within which to submit a brief on his contention that one value can be put on separate ownerships. No brief was submitted and the trial proceeded upon the theory that separate ownerships required separate values, even though all ownerships are farmed as one unit.

Counsel for defendants now state as one of the grounds for vacating the judgment and granting a new trial that they have newly discovered evi-

dence to show a common ownership of all the parcels. It is submitted that the supporting affidavit does nothing more than show there was a single operation on the separate parcels, which at all times has been recognized by both parties and the Court. It was pointed out by the Court during the arguments on December 12 and 13, 1956, on this point that if four contiguous farmers not related by blood or marriage deemed it more profitable to farm their separate ownerships as one unit by tearing down the fences and farming in longer strips, the law would require separate valuations on each ownership in the event all were being condemned. The analogy is sound and applies to the instant case and motion. In addition all facts were known to defendants at the time of trial.

Newly Discovered Evidence

The comorable sale of John Brinkman to Joe Meissner is now under attack by defendants' motion and the supporting affidavit at the top of page 7 states that the transaction was not at arm's length then refers to the affidavit of Brinkman attached thereto. John Brinkman was subpoenaed by the government and was in and about the courtroom during the course of the trial in January, 1957. The defendants and their then counsel had an opportunity to talk to Mr. Brinkman if they had chosen. In any event his testimony could have been used on rebuttal, if at the time of trial Joe Meissner's testimony was doubted or could have been proved false.

The bare affidavit of Brinkman without the privilege of cross-examining him is at this late date of little value in connection with its intended purpose.

As stated in *Gill v. United States* (1950), C.A. 2, 184 F. 2nd 49, 55:

“This motion being in the nature of one for a new trial based upon newly discovered evidence, it is essential at least that the evidence sought to be introduced is such that it would probably change the result.”

It is difficult to conceive that the Brinkman-Meissner comparable sale would have changed the result, even though Brinkman might have been called to say it sold for $\frac{1}{2}$ its real market value.

The supporting affidavit to the instant motion states that for the year 1952 while Joe Meissner had defendants' land under lease the average production was 16 bushels per acre instead of 13 bushels per acre as Meissner testified. Affiant reaches his conclusion by adding the elevator tickets and dividing by the number of acres reported to have been seeded according to the A. S. C. office of Liberty County. This procedure is by no means conclusive since Meissner may have had more acres seeded than he reported to that federal agency and the record will show that some of Kolstad's land is in Toole County. The seeded acres in Toole County are not shown. It is believed the total acreage owned

by either or both defendants—Kolstads in Toole County was nearly 12 sections although no doubt much of it was not seeded in 1952 or 1953. As to 1953 the difference in production averages between Meissner's testimony and Kolstad's affidavit is 22 bushels per acre versus 24 bushels per acre. And even if Toole County were not involved there is no showing the larger yields would have changed the result.

Necessary and Proper Parties

The evidence adduced at the trial, as it is recalled, did not in any way indicate that the sons of Clarence A. and Alta A. Kolstad had an interest in the real estate by lease or otherwise. It did appear that said sons had an interest in the wheat ranching operations, but that is of no moment, since it was the land being condemned and not the farming operation or business.

The Kolstad sons were not known by the government to have had an interest or to have claimed an interest in the land involved and would therefore come under the designation of "Unknown owners." At least one and it is believed two of the Kolstad sons were present at the beginning of the trial and also at practically all stages thereof. Such being the case, they had notice, failed to make their claim known and as a consequence were defaulted even if they in fact had an interest in the land. Defendants Clarence A. and Alta A. Kolstad, in any event, are not the proper parties to raise such a point.

Dated this 18th day of November, 1957.

/s/ KREST CYR,

United States Attorney.

[Endorsed]: Filed November 18, 1957.

[Title of District Court and Cause.]

ORDER

Clarence A. Kolstad and Alta A. Kolstad, defendants in a condemnation case brought by the United States, filed a motion under Rule 60(b) of the Federal Rules of Civil Procedure to set aside the judgment on November 14, 1957. Prior thereto and on April 19, 1957, the same defendants filed a notice of appeal in the cause and said appeal is still pending.

The first problem to be considered in connection with the motion to set aside the judgment is whether or not this Court has jurisdiction to consider said motion in view of the fact that upon the filing of the notice of appeal jurisdiction of the case passed from this Court to the Court of Appeals.

While it is obvious from a reading of Rule 60(b) that a motion to set aside a judgment is authorized even when the case is pending on appeal, no procedure is established by the Rule for the handling of such motion. So far as this Court can find the Court of Appeals for the Ninth Circuit has not con-

sidered the problem of what should be done with a Rule 60(b) motion in a case which is before the Court of Appeals on appeal. However, the problem has been considered by the Court of Appeals for the District of Columbia in *Smith v. Pollin*, 194 Fed. (2d) 349, and by the Court of Appeals for the Fifth Circuit in *Ferrell v. Trailmobile, Inc.*, 223 Fed. (2d) 697. The holding in those cases is that while a District Court has no authority to grant a Rule 60(b) motion in a case which is on appeal, it does have jurisdiction to consider and deny such motion; and if the District Court, upon considering such motion, indicates that it would grant the motion, the appellant should then move in the Court of Appeals to remand the case to the District Court in order that the District Court may grant the motion. This procedure seems to the Court to be reasonable and proper to secure the just, speedy and inexpensive determination of a Rule 60(b) motion, and the Court will proceed to consider said motion.

The first ground of the motion to set aside the judgment is that the case was tried and just compensation awarded on the basis that the property condemned consisted of three separate ownerships, whereas in truth and in fact the property was owned by the defendants as tenants in partnership and that through surprise, mistake and excusable neglect these defendants were unable at the trial to show such ownership.

A consideration of this ground of the motion requires a brief outline of the history of the case.

Some 9,000 acres of land were taken by the government out of a total of approximately 17,000 acres owned by the defendants Clarence A. and Alta A. Kolstad. Of this 17,000 acres the legal title to approximately 5,000 acres stood in the name of Clarence A. Kolstad, the legal title to another 5,000 acres stood in the name of Alta A. Kolstad, and the legal title to the remaining acreage stood in the name of Clarence A. and Alta A. Kolstad as joint tenants. The evidence showed that the entire 17,000 acres was operated as a unit. Some land out of each ownership was included in the 9,000 acres taken and after the taking some land remained in each of the ownerships.

Trial on the issue of just compensation in the case was originally set for the month of February, 1956, at Glasgow, Montana. At that time a motion for continuance was made on behalf of the defendants Kolstad upon the ground that Mrs. Kolstad was ill and unable to attend the trial, and that as she owned one parcel of land herself and owned jointly with her husband another parcel, a continuance would be proper in order that she could appear at the trial. The motion was granted. Thereafter the case was again set for trial in the month of December, 1956, at Havre, Montana. Shortly before the date set for trial, the defendants Kolstad desired to discharge their then counsel and substitute new counsel. The original counsel declined to withdraw from the case until provision was made for the payment of their fee, and a hearing was had upon the de-

endants' motion to substitute counsel and upon the attorneys' motion that the Court fix their fee for services rendered. At that hearing evidence was taken and the defendant, Clarence A. Kolstad, in testifying under oath as to the services rendered by his original counsel, went out of his way to point out that his wife owned a portion of their farm in her own right and that she had purchased it with her own money. No suggestion was made on either of these occasions that the land was owned by any partnership.

Trial was commenced on December 12, 1956. Inasmuch as only part of the lands were taken, the before and after rule had to be applied in determining just compensation. When the trial commenced, defendants proceeded to establish the value of the entire 17,000 acres as a whole. In the course of his testimony the defendant Clarence A. Kolstad was asked the following questions and gave the following answers:

“Q. You might explain what the ownership of your wife is, and your own ownership with respect to this 17,000 odd acres shown in Exhibit 1.

“A. Well, in the beginning in 1942, when I first bought it, we bought two ranches, as I testified to. My wife bought what was known as the Sailer ranch, and I bought what was known as the Martin Wasesha ranch, so that she owns that in her right, and I own the other one as we purchased it, and the Turner ranch that we bought later, we bought it in joint tenancy.

“Q. Well, substantially, without going into the exact details of it, then, your wife owns approximately half of the land and you own approximately half? A. That is close enough.

“Q. Some of it in joint tenancy and others individually owned by her and individually owned by you? A. Yes.

“Q. And while it is probably not important, but when you say that your wife bought one ranch, that was bought with her own money?

“A. Yes; it was.

“Q. It was actually her ranch? A. Yes.

“Q. It wasn't just a husband and wife deal where you had it deeded to her in her name?

“A. No.

“Q. Bought with her own money.”

No suggestion of partnership ownership was made by the witness. At this point the Court interrupted the trial and suggested that in view of the law, there being three separate and distinct ownerships involved, they could not be valued as a single ownership. After some discussion, defendants' counsel moved for a continuance upon the basis that he was not prepared at that time to try the case as three separate ownerships. The Court granted the continuance and also gave counsel for the defendants a week within which to present to the Court some authority to the effect that even though three ownerships were involved, they could be valued as one

because they had been operated as a unit. No authority to that effect was presented. Thereafter trial was resumed on January 17, 1957, and proceeded upon the theory of three separate ownerships. Judgment was entered for the amount which the jury fixed as just compensation and notice of appeal was filed.

Thereafter the defendants again changed counsel and this Rule 60(b) motion was presented. Now, for the first time is the suggestion made that the lands involved are owned by a partnership; this despite the repeated assertions throughout the course of this case by the defendant Clarence Kolstad to the effect that he owned part of the ranch, his wife owned part of the ranch, and they owned part of it jointly. The above quoted excerpt from the testimony of the defendant, Clarence Kolstad, is illustrative of his position throughout.

There is no question from the record in this case that all three ownerships were farmed together as a single operation, nor is there any question that the more land that can be brought into a wheat farming operation the more profitable the operation becomes. However, it is not the operation that is being valued, but the land, and the damage that arises from a taking of the land is to the owner of the land. Neither the counsel who tried the case for the defendants, nor their present counsel have presented the Court any authority holding that land held in different ownerships, but operated as a unit, may be considered as a whole for the purpose of

determining fair market value in a condemnation case, and the Court has been unable to find any such authority. All the authority which the Court has found is to the contrary. Thus in 18 Am. Juris., Eminent Domain, Section 271, page 912, the following rule is stated:

“Application of Principle to Lands of Different Owners—Tracts held by different titles vested in different persons cannot be considered as a whole where it is claimed that one is incidentally injured by the taking of the other for a public use. This is the rule although the owner of the tract taken holds an interest in the property claimed to be damaged, and although the two tracts are used as one.”

In *Glendenning v. Stahley*, 173 Ind. 674, 91 N.E. 234, where one tract was owned by a man and his wife as tenants by the entirety, and the other was owned by the husband alone, the Court said:

“It is settled that in determining the amount of special benefits or damages sustained by any one proprietor, all land belonging to him lying in a contiguous body, and used together for a common purpose, will be considered as one tract or farm, without regard to governmental subdivision. * * * This principal cannot be extended to cover lands owned by different proprietors, although contiguous and used under one management and for a common purpose.”

To the same effect is the holding in the case of *Duggan v. State*, 214 Iowa, 230, 242 N.W. 98, where one tract was owned by a sister and brother jointly, and the other tract was owned by the sister alone.

In *McIntyre v. Board of County Commissioners*, 211 Pac. (2d) 59 at page 63, the Kansas Court, in discussing the *Glendenning* and *Duggan* cases above referred to, made the following statement:

“It is true that in a great majority of the adjudicated cases the taking was from only one of the tracts used in conjunction with another tract or tracts owned by another but used together as one unit, while in the case before us we not only have a diversity of ownership of the two tracts used and operated as one farm unit, but we also have a taking from each tract in question. However, the same general principle must apply, that is, the pieces of land alleged to be a single tract must be owned by the same party and one owner is not entitled to recover compensation for land taken from him because of alleged damage resulting to that portion of his land remaining on account of the taking of land belonging to another even though, as under the facts of this case, the two tracts had been farmed and operated as one unit.”

In the *McIntyre* case the husband owned one 80-acre tract, his wife owned an adjoining 80-acre tract and both tracts were operated together as one farm unit.

The rule above announced by the Supreme Courts of the States of Indiana, Iowa and Kansas has also been recognized by the Court of Appeals for the Ninth Circuit in the case of *United States v. Honolulu Plantation Co.*, 182 Fed. (2d) 172 at page 175, where the Court said:

“It is a rule that, in condemnation of part of a tract owned in fee simple, just compensation is the market value of the tract as a whole, before condemnation, less the market value of the portion which remains after the taking of the part. The rule applies exclusively to condemnation of fee simple title of a tract in one ownership.”

See also Annotation in 6 ALR (2d) 1204.

An additional ground for the motion to set aside the judgment is alleged newly discovered evidence in connection with the testimony of one John Meissner. Mr. Meissner had operated the ranch of the defendants under lease on a share crop basis for several years and he testified as a witness on behalf of the government as to the production from said lands during the time he operated them. The claimed newly discovered evidence it is asserted will show that the production was more than testified to by Mr. Meissner. The short answer to this is that there is nothing newly discovered about such evidence. As a result of the pretrial conferences, the defendant Clarence Kolstad and his counsel were well aware that Mr. Meissner was going to be

called as a witness on behalf of the government, and as the landlord under a share crop lease arrangement, Mr. Kolstad had available to him all the knowledge as to production which his share crop tenant had, and should have presented his production figures at the trial if they were different than the production figures of Mr. Meissner.

The government also presented through Mr. Meissner evidence of a comparable sale of a ranch wherein Mr. Meissner was the purchaser. Defendants now claim to have "newly discovered" evidence that the transaction between Mr. Meissner and the vendor was not an arm's length transaction. Again, as a result of the pretrial conference, defendants were advised of the fact that Mr. Meissner would testify to the comparable sale. The seller to Mr. Meissner was available and could have been called by the defendants. Finally, counsel for the defendants did not see fit to even cross-examine Mr. Meissner at all with respect to the comparable sale.

For all of the foregoing reasons It Is Ordered that the motion to set aside the judgment be and the same hereby is denied.

Done and dated this 5th day of December, 1957.

/s/ W. D. MURRAY,
United States District Judge.

[Endorsed]: Filed and entered December 6, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Clarence A. Kolstad and Alta A. Kolstad, the Defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order denying their Motion to set aside the Judgment made and entered in the above-entitled action on the 5th day of December, 1957.

Dated this 31st day of December, A.D. 1957.

CEDOR B. ARONOW &
ELMO J. CURE,

By /s/ ELMO J. CURE,
Attorneys for Defendants-
Appellants.

[Endorsed]: Filed January 2, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The points upon which Defendants-Appellants, Clarence A. Kolstad and Alta A. Kolstad, will rely on appeal are:

1. The Court erred in ordering the trial to proceed on the theory of divided ownership of the land;
2. The Court erred in withdrawing the question of ownership of the land from the jury;

3. The Court erred in changing the theory of the case upon its own motion;

4. The Court erred in entering a deficiency judgment contrary to the evidence;

5. The Court erred in entering final judgment of condemnation contrary to the verdict and the evidence;

6. The Court erred in requiring evidence of value to be separated into three parcels;

7. The verdict is contrary to the evidence;

8. Irregularity in the proceedings of the court by which defendants-appellants were prevented from having a fair trial;

9. Accident and surprise which ordinary prudence could not have guarded against and the admission of the testimony of Joe Meissner;

10. Newly discovered evidence in connection with the testimony of Joe Meissner material to the defendants-appellants which they could not with reasonable diligence have discovered and produced at the trial;

11. The verdict is contrary to law.

Dated this 30th day of January, A.D. 1958.

CEDOR B. ARONOW &
ELMO J. CURE,

By /s/ ELMO J. CURE,

Attorneys for Defendants-Appellants, Clarence A.
Kolstad and Alta A. Kolstad.

[Endorsed]: Filed February 3, 1958.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL
FROM MOTION

Defendants-Appellants, Clarence A. Kolstad and Alta A. Kolstad, herewith present the points on which they claim the court erred in denying their Motion to set aside the Judgment:

In denying Defendant-Appellants' Motion to set aside the Judgment.

CEDOR B. ARONOW &
ELMO J. CURE,

By /s/ ELMO J. CURE,
Attorneys for Defendants-Appellants, Clarence A.
Kolstad and Alta A. Kolstad.

[Endorsed]: Filed February 3, 1958.

In the United States District Court, District of
Montana, Havre Division
No. 1726

UNITED STATES OF AMERICA,
Plaintiff,
vs.

11,211.45 Acres of Land, More or Less, in the Counties of Liberty and Toole, State of Montana;
CLARENCE A. KOLSTAD, et al.,
Defendants.

REPORTER'S TRANSCRIPT

The above cause came on regularly for trial before the Hon. W. D. Murray, United States District

Judge for the District of Montana, sitting with a jury, at Havre, Montana, on December 12, 1956, and was thereafter continued until January 17, 1957. The plaintiff was represented by its counsel, Mr. Krest Cyr, United States States Attorney for the District of Montana, Mr. Dale Galles and Mr. Michael J. O'Connell, Assistant United States Attorneys for the District of Montana, and the defendants Clarence A. Kolstad and Alta A. Kolstad were represented by their counsel, Messrs. R. G. Wiggenghorn and John M. Schiltz.

Thereupon, the following proceedings were had:

The Court: No. 1726, United States Versus Kolstad.

Mr. Galles: The government is ready.

Mr. Wiggenghorn: The defendants are ready.

The Court: Very well, call a jury.

Thereupon, the following named persons from the jury panel were called by the Clerk:

John L. King, Donald W. Powellson, Lucille Fisher, Bernice Lineweaver, Ben F. Underwood, Phil Yates, Lucille Nash, Donald D. Campbell, Kenneth Jackson, Richard Leighton, George Dielman, and Frank Goodian,

and were duly sworn to well and truly answer all questions put to them touching upon their qualifications to serve as trial jurors in the cause at issue.

Voir Dire Examination of the Jury

By the Court:

Q. Ladies and gentlemen of the jury panel, the case which we are going to commence to try this morning is another condemnation case in which the United States Government has taken for a public use lands of the defendant landowners under its power of eminent domain. This is a case in which the United States of America is the plaintiff, and the landowners here involved are Mr. and Mrs. Clarence Kolstad. Now, I will ask each of you a couple of questions individually just to get you located in the jury box to see who is who. Starting in the back row, are you Mrs. Fisher? A. Yes.

Q. Where do you live, Mrs. Fisher? [2*]

A. I live five miles south of Zurich.

Q. On a ranch? A. Yes, sir.

Q. What kind of ranch?

A. Partly irrigated, and my husband has a small dry farm not irrigated.

Q. How long have you lived there?

A. I have lived there for 30 years. I lived there with my relatives before my husband and I got the place.

Q. Do you have any knowledge or opinion of your own as to the value of lands generally in the area of the Tiber Dam Project?

A. I have none whatever.

Q. You are not acquainted with the lands in-

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

(Examination of the Jury.)

involved, the lands involved being Mr. Kolstad's up by the Tiber Dam? A. No, sir, I am not.

Q. And the next gentleman, what is your name?

A. Phil Yates.

Q. Where do you live, sir? A. Havre.

Q. What is your occupation?

A. Vice President of the Citizens Bank.

Q. Do you own any farm or ranch lands?

A. No, I don't.

Q. Are you acquainted with the particular lands here involved [3] up under the Tiber Dam Project?

A. Not the particular lands.

Q. You have some knowledge of the lands generally up in that area? A. Yes.

Q. Do you have an opinion of your own as to the value of lands in that area?

A. I know something of the current values of farm land in that area, yes.

Q. As a result of your work in the bank, you deal in land values, do you?

A. We have some knowledge of them, yes.

Q. As a result of that, you have a fixed opinion as to the general value of lands in that area?

A. Yes.

Q. Is it such an opinion that it would take evidence to change your mind with reference to it? You are now satisfied as to the value of lands up there, are you, in your own mind?

A. That is in a very general way.

Q. Do you think your opinion is such that you would be able to sit as a juror in the trial of this

(Examination of the Jury.)

case, and decide the case, putting aside any opinions you may have, and that you could then decide the case upon the basis of the testimony and evidence presented in Court? [4]

A. I do.

Q. Any opinions that you have, you could put aside and out of your mind entirely for the purpose of trying this action? A. Yes.

Q. You would decide the case just upon the testimony and evidence presented in Court, and upon the instructions the Court gives you? You would accept my instructions as to how the question of just compensation in this case is to be fixed and determined, would you? A. I would.

Q. Do you know of any reason why, if selected to act as a juror in the trial of this case, you could not try the case fairly and impartially?

A. No.

Q. Do you know Mr. Kolstad?

A. Casually, yes.

Q. Do you have business dealings with him?

A. Not directly.

Q. Well, how about indirectly? What is the nature of your dealings with him?

A. Well, he is a customer of the bank. However, I have not handled any of his business dealings myself.

Q. You just know him to see him and to know who he is, is that correct? A. Correct. [5]

Q. You have no special activities together or anything of that nature? A. No.

(Examination of the Jury.)

Q. You don't know any reason then why you couldn't try the case fairly and impartially?

A. No.

Q. Are you acquainted with any of the counsel for Mr. Kolstad or the government?

A. No, I am not.

Q. And the third person?

A. Mrs. Lineweaver.

Q. Oh, yes, Mrs. Lineweaver. Where do you live, Mrs. Lineweaver?

A. Havre at the present.

Q. And you are married? A. Yes, sir.

Q. What does Mr. Lineweaver do?

A. We have the Northern Tire Company in Havre, and also farm north of Inverness.

Q. Now, do you have any fixed opinion as to the value of lands generally in the Tiber Dam area?

A. Well, being on that last case, I have had quite a lot of thought about it.

Q. You sat on a case in which you did fix the just compensation on particular land? [6]

A. Yes, sir.

Q. Well, would the fact that you sat on that case, do you think, bias or prejudice you in the trial of this case? A. No, sir.

Q. In other words, you decided that case just upon the evidence that was presented in Court and under the instructions of the court, and you followed the instructions of the court and arrived at a verdict? A. Yes, sir.

(Examination of the Jury.)

Q. Do you think, then, you could sit as a juror in this case and do the same thing?

A. Yes, sir.

Q. Decide the case just upon the evidence that is presented here? A. Yes, sir.

Q. If you are chosen to act as a juror, you would do so? A. Yes, sir.

Q. And the fourth person?

A. Mr. Underwood, Havre.

Q. Underwood. Where are you from, sir?

A. Havre.

Q. What is your occupation?

A. Life Insurance agent.

Q. Do you own any ranch or farm land?

A. No. [7]

Q. You are not engaged in that business at all?

A. No, I am not.

Q. Do you have any acquaintanceship with Mr. Kolstad? A. I know Mr. Kolstad, yes.

Q. What is the nature of that?

A. Just casually.

Q. Just speak to him?

A. Yes, and I talk to him.

Q. You don't have any particular business dealings with him? A. None at all.

Q. Are you acquainted with his land that is involved in this case?

A. No, I am not. I know approximately where it is.

Q. Do you have any fixed opinion, or any opin-

(Examination of the Jury.)

ion at all as to the value of lands up in the area of the Tiber Dam?

A. No, I don't believe I do.

Q. You think if you were chosen to act as a juror, you could sit in the case and try it fairly and impartially? A. Yes.

Q. Both as far as the government is concerned and Mr. Kolstad is concerned? A. Yes.

Q. Could you decide the case just upon the evidence presented in court and could you follow my instructions as to what the law is? [8]

A. Yes.

Q. Do you know of any reason why, if you are chosen to act as a juror, you couldn't try the case fairly and impartially? A. No, I don't.

Q. And the next gentleman is?

A. John L. King.

Q. Where do you live, Mr. King?

A. Havre.

Q. What is your occupation?

A. Switchman.

Q. Do you do any farming operation at all?

A. No, I don't.

Q. Do you own any farm or ranch land?

A. No, sir.

Q. You sat in the last case, too, I believe?

A. Yes.

Q. As a result of having sat on that case, do you have any fixed opinion as to the value of lands generally up in the Tiber Dam area?

A. No, I don't.

(Examination of the Jury.)

Q. It is just a question of proof in the particular case, then, as far as you are concerned?

A. Yes.

Q. In the case you sat on, you listened to the evidence and [9] the instructions of the court and arrived at a verdict?

A. Yes.

Q. Do you think you could do the same thing in this case?

A. Yes.

Q. You would have to wipe out of your mind the particulars of the other case as you sit in this case, and decide this case just upon the testimony presented in this case. Do you think you could do that?

A. Yes.

Q. You are not acquainted with Mr. Kolstad?

A. No.

Q. Or any of the counsel. Is there a reason of any kind that you know of why you couldn't sit on the case and try it fairly and impartially?

A. No, there isn't.

Q. Mr. Powellson, is it?

A. Yes.

Q. Where do you live?

A. Havre.

Q. What is your occupation?

A. Carpenter.

Q. Do you engage in any farming operations?

A. No, sir.

Q. Or own any farm or ranch land?

A. No. [10]

Q. Are you acquainted with Mr. Kolstad?

A. No, I am not.

Q. Or any of counsel in the case?

(Examination of the Jury.)

A. No.

Q. Are you acquainted with the particular lands involved of Mr. Kolstad's up under the Tiber Dam?

A. No.

Q. Do you have any opinion as to the value of lands in that area? A. No.

Q. If you are chosen to act as a juror, you could sit in the case and try it fairly and impartially as to both sides? A. Yes.

Q. Could you decide the case upon the testimony and evidence presented here in court and the instructions as I give them to you as to what the law is? A. Yes.

Q. Could you accept those instructions whether you agreed with them or not? A. Yes.

Q. There is no reason you know of why you couldn't sit in the case fairly and impartially?

A. No, sir.

Q. You are Mrs. Nash?

A. That's right. [11]

Q. Where do you live, Mrs. Nash?

A. I live a mile southwest of Chinook on a farm.

Q. Your husband operates a farm there?

A. Yes.

Q. As a result of that, do you have any fixed opinion as to the value of lands in the Tiber Dam area? A. No, I don't.

Q. Are you acquainted with the lands up there at all? A. No.

Q. You don't know the particular lands involved here? A. No.

(Examination of the Jury.)

Q. You don't know Mr. Kolstad? A. No.

Q. Or any of the counsel in the case?

A. No, I don't.

Q. If you are chosen to act as a juror in this case, do you think you would be able to try the case fairly and impartially as to both sides?

A. Yes.

Q. You would decide the case upon the testimony and evidence presented here in court? A. Yes.

Q. And you would follow my instructions as to what the law is whether you agreed with them or not, you would just accept them, would you? [12]

A. Yes.

Q. You don't know of any reason why you couldn't act fairly and impartially in the case?

A. No.

Q. Your name? A. Donald Campbell.

Q. Where do you live? A. Havre.

Q. What is your occupation? A. Barber.

Q. Do you engage in any farming or ranching operations? A. No, sir.

Q. Do you own any farm or ranch land?

A. No, sir.

Q. Do you know Mr. Kolstad?

A. No.

Q. Or counsel in the case? A. No.

Q. Do you have any opinion as to the value of lands in the Tiber Dam area?

A. Very slight opinion, just talk.

Q. Just a passing opinion. It is not such an opinion that is fixed in your mind? A. No.

(Examination of the Jury.)

Q. Whatever kind of opinion you have, is it such that you [13] would be able to put it out of your mind entirely for the purpose of sitting on this case? A. Yes.

Q. You could sit in this case and decide the issue involved here, which is just compensation, just upon the testimony and evidence that is presented in this case? A. Yes, sir.

Q. And the law as I give it to you? Could you follow my instructions as to the law?

A. Yes, sir.

Q. Do you know any reason why you couldn't sit on the case and try it fairly and impartially?

A. No, sir.

Q. Your name sir? A. Kenneth Jackson.

Q. Where do you live?

A. North of Hingham.

Q. And you are engaged in farming?

A. Farming.

Q. What kind of farming?

A. Grain and cattle.

Q. Are you acquainted with the lands in the Tiber Dam area?

A. No. I know where it is.

Q. You don't know the particular lands here involved owned by Mr. Kolstad? [14]

A. No.

Q. Do you know Mr. Kolstad? A. No.

Q. Or any of counsel in the case? A. No.

Q. Well as a result of your own operations, you,

(Examination of the Jury.)

of course, have some opinion as to land values of your own land and in your neighborhood, I suppose?

A. Yes.

Q. Well, is that opinion such that you could put it aside as far as the trial of this case is concerned?

A. Yes.

Q. We are not interested, of course—the matter is not determined upon what any juror's opinion is as to other values, or what the values ought to be, anything of that nature. We will decide the case upon the testimony and evidence presented in court and under the instructions I give you as to what the law is. You take those instructions and follow them to the letter and you then decide what the facts are under the testimony and evidence, and you think you could do that in this case?

A. Yes, sir.

Q. Fairly and impartially? A. Yes, sir.

Q. Both to Mr. Kolstad and to the [15] government? A. Yes, sir.

Q. Do you know of any reason at all why, if you are chosen to act as a juror, you can't try the case fairly and impartially?

A. No, I don't.

Q. Mr. Leighton? A. Leighton.

Q. Where do you live, Mr. Leighton?

A. Chester.

Q. You work for the county as I recall it, is that right? A. Yes.

Q. You don't engage in any farming operations yourself? A. No, I don't.

(Examination of the Jury.)

Q. Or own any farm land? A. No.

Q. You, of course, are acquainted with the general area of the lands under the Tiber Dam?

A. Yes.

Q. Are you familiar with the lands here involved? A. I know of the lands.

Q. You don't have any special knowledge of those lands?

A. I have been over those lands.

Q. How did you happen to go over them?

A. Oh, in my hunting trips and fishing trips.

Q. I see, so you just have a general acquaintance with the [16] land, you never worked on the land or inspected it or appraised it? A. No.

Q. Well, you also sat on the trial of the previous case? A. Yes.

Q. Which involved lands under the Tiber Dam?

A. Yes.

Q. As a result of that, do you now have any fixed opinion as to the value of lands up there generally?

A. Just some idea of the surrounding territory.

Q. Well, you did fix, of course, in the other case the value of the particular lands there involved, what just compensation the owner was entitled to, but could you put that and the evidence in the other case out of your mind? A. Yes.

Q. If you are chosen to act as a juror in this case? A. I could.

Q. And decide the question of just compensation in this case just upon the testimony and evi-

(Examination of the Jury.)

dence presented here in court? A. I could.

Q. Under my instructions as to what the law is?

A. Yes.

Q. You don't, then, have any opinion that would bias or prejudice you in any way? [17]

A. No.

Q. Mr. Dielman, where do you live, sir?

A. Box Elder.

Q. What is your occupation?

A. Farming.

Q. What kind of a farm?

A. Wheat and some cattle.

Q. You also sat in the last case?

A. Yes, sir.

Q. Let me ask you first, do you know Mr. Clarence Kolstad? A. I don't know him.

Q. Or any of counsel, except as you saw them in the courtroom? A. That is all.

Q. Well, as a result of your sitting in the other case, do you have any opinion as to the value of lands generally under the Tiber Dam project?

A. Not any more than what we heard in the last case.

Q. Well, of course, you understand that was for your consideration in the determination of that case, and you do, as a result of that case, and the evidence in that case, have an opinion as to the value of lands generally up there? A. Some.

Q. Is that such that you could put it out of your mind?

(Examination of the Jury.)

A. No, I don't think it is, I think I could pass a fair verdict. [18]

Q. In other words, you think you could put aside the evidence and testimony in the last case, put it out of your mind and just decide this case upon the testimony and evidence presented here?

A. Yes, sir.

Q. The testimony may be entirely different, you see, and if it is, can you put that other testimony out of your mind so that you can just judge and weigh the testimony in this case? A. Yes.

Q. You think you could do that? A. Yes.

Q. And if you are chosen to act as a juror, the fact you do have some opinion as a result of sitting in the other case, that wouldn't bias or prejudice you in this case so far as Mr. Kolstad is concerned?

A. No.

Q. Or so far as the government is concerned either? A. No.

Q. You think you could approach the thing fairly and impartially and decide the thing just on the evidence in this case and my instructions as to what the law is? A. I do.

Q. Mr. Goodian, is it? A. Yes, sir. [19]

Q. Where do you live, sir? A. Box Elder.

Q. What is your occupation?

A. Wheat farming.

Q. You also sat in the last case, as I recall?

A. Yes, sir.

Q. You are not acquainted with Mr. Kolstad?

A. No, sir.

(Examination of the Jury.)

Q. Or counsel? Do you have any knowledge of the particular lands here involved owned by Mr. Kolstad? A. Just from the last case.

Q. These lands weren't involved in the last case. You did sit in the last case and return a verdict with reference to just compensation. As a result of that, do you have any fixed opinion as to what the value of lands generally are in the Tiber Dam area? A. No, sir.

Q. You were just concerned with fixing the particular values in that case? A. Yes, sir.

Q. Whatever knowledge you have in your mind as a result of having sat in that case, you can put aside, can you, as far as sitting as a juror in this case is concerned? A. Yes, sir.

Q. You would decide this case just upon the evidence presented [20] here in this case?

A. Yes, sir.

Q. And decide it under my instructions as to what the law is? A. Yes, sir.

Q. Do you know any reason why you couldn't act as a fair and impartial juror? A. No, sir.

Q. Treating Mr. Kolstad fairly and treating the government fairly, and decide the case between them as between equals. I might ask you all and say this to you: It may appear from the evidence that the defendant here is a very large operator, and the lands involved are quite extensive. In sitting as jurors in the trial of the case, would that fact bias or prejudice you in anyway?

(No audible response.)

(Examination of the Jury.)

Q. Do any of you think that the fact that Mr. Kolstad, the owner here, may be a very prosperous and large operator, would that bias or prejudice you in anyway in sitting in the case?

(No audible response.)

Q. You think you could treat him just as fairly as you could treat a small operator?

(No audible response.)

Q. Everyone must be treated equally. You understand that [21] and would you do that?

The Jurors: Yes.

The Court: Are there any particular questions?

Mr. Schiltz: We have none, your Honor.

Mr. Galles: No.

The Court: Very well, the defendant's, or the government's first peremptory challenge.

(Government's First Peremptory Challenge:
Phil Yates.)

The Clerk: R. V. Umstead.

R. V. UMSTEAD

sworn.

Examination

By the Court:

Q. Where do you live, Mr. Umstead?

A. Chinook.

Q. What is your occupation?

A. I have a lumber yard; I also have a farm.

(Examination of the Jury.)

Q. What kind of a farm?

A. An irrigated farm.

Q. Are you acquainted with the lands generally under the Tiber Dam project?

A. No. I have been up there fishing. I have seen some of it.

Q. As a result of operating a farm yourself, you have an opinion, of course, as to the value of that farm, I suppose?

A. Yes, but it is a different kind of farm.

Q. A different kind of farm?

A. Yes. [22]

Q. You don't then have any opinion as to the value of farm or ranch land under the Tiber Dam project?

A. No, sir.

Q. You don't have any knowledge of that at all, and you have no opinion?

A. No, sir.

Q. Then, you think if you are chosen to act as a juror in the trial of this case, you could try the case fairly and impartially both as to Mr. Kolstad and the government?

A. Yes.

Q. Could you decide the issue here, which is just compensation, what Mr. Kolstad is entitled to, just upon the testimony and evidence that is presented here in court?

A. Yes.

Q. And under the instructions I give you as to the law?

A. Yes.

Q. You would follow those instructions, would you?

A. Yes.

Q. To the letter?

A. Yes, sir.

Q. I might ask you also that if it appears from

(Examination of the Jury.)

the evidence, as it may very well, that Mr. Kolstad is himself a prosperous, large operator, and that the lands here involved are quite extensive, would those facts bias or prejudice you in determining the value of the lands taken? [23]

A. No, sir.

Q. You would be able to treat him just as you would any other person who came before the court and jury in a case of this kind?

A. Yes, sir.

Q. Fairly and impartially, granting to him all that he is entitled to, whether he be rich or poor?

A. Yes, sir.

Q. There is no reason at all, then, that you know of, why you couldn't sit in the case and try it fairly and impartially?

A. No, sir.

The Court: Anything further?

Mr. Galles: Nothing further.

Mr. Schiltz: Nothing further.

The Court: Step down, please, take a seat along the rail. The defendants' first peremptory challenge.

(Defendants' First Peremptory Challenge:
Donald W. Powellson.)

The Clerk: John Rocks.

JOHN ROCKS

sworn.

Examination

By The Court:

Q. Mr. Rocks, where do you live?

A. Joplin.

(Examination of the Jury.)

Q. What is your occupation?

A. Well, I am a farm laborer.

Q. Do you own any farm land up there? [24]

A. Not now.

Q. You used to in years past?

A. I did. I sold my place three years ago.

Q. As a result of your experience and having owned land and working around farm and ranch properties, do you have a fixed opinion as to the value of lands up in that area? A. No.

Q. You don't. You had a fixed opinion, I suppose, of the value of your own property, but you don't have any opinion, you say, as to the value of lands generally under the Tiber Dam project?

A. Not particularly.

Q. Are you acquainted with those lands?

A. I am.

Q. Just how extensive is your acquaintance?

A. Just going across and so on.

Q. You have been through there?

A. Lots of times.

Q. You have seen generally what kind of land it is? A. Yes.

Q. Do you know anything about the particular lands here involved owned by Mr. Kolstad?

A. No, I don't—just to a certain extent I do.

Q. You know just where they are, generally?

A. That's right. [25]

Q. You don't have any idea, then, as to their value? A. Not particularly, no.

Q. You have no opinion with reference to it?

(Examination of the Jury.)

A. No, I haven't.

Q. Do you think that you could—that is the question we are going to have to determine in this case, the government having taken some land from Mr. Kolstad, we are going to have to determine what he is entitled to, what is just compensation to him to make him whole, so that when this case is over, as a result of the government having taken his land, he will be neither richer nor poorer; the jury is going to have to give him enough money in damages so he will be neither richer nor poorer as a result of this taking, so we are concerned with the values up there. Do you think you could sit in this case and try it fairly and impartially so far as Mr. Kolstad is concerned?

A. Yes, sir.

Q. And so far as the government is concerned?

A. Yes, sir.

Q. Would you decide the case just upon the testimony and evidence presented here in court?

A. Yes, sir.

Q. And not upon any ideas of your own as to what lands are or ought to be worth up in that country. Do you know any reason at all why you couldn't try the case fairly and impartially? [26]

A. No.

Q. Would the fact that Mr. Kolstad may be a prosperous large operator and the lands here involved are quite extensive, would that bias or prejudice you in anyway?

A. No.

Q. You believe, just as the law does, that he is entitled to fair treatment whether he is rich or poor?

(Examination of the Jury.)

A. That's right.

The Court: Anything further?

Mr. Galles: No, your Honor.

The Court: The government's second peremptory challenge.

(Government's Second Peremptory Challenge: Ben F. Underwood.)

The Clerk: Earl F. Keith.

EARL F. KEITH

sworn.

Examination

By the Court:

Q. Mr. Keith, where are you from?

A. Chester.

Q. What is your occupation? A. Farmer.

Q. What kind of farming do you engage in?

A. Wheat farming.

Q. And, of course, you are acquainted with the lands generally up under the Tiber Dam project?

A. Yes. [27]

Q. Do you have an opinion as to the value of lands up there? A. My own land, yes.

Q. Do you have any opinion as to the lands generally under the Tiber dam, in that area?

A. Generally.

Q. Generally you have an opinion as to the value of lands. Are you acquainted with the particular lands here involved?

A. I know their whereabouts.

(Examination of the Jury.)

Q. You don't know the lands specifically, you don't know the type of soil, or what they produce, or anything of that nature, you have no particular information about it? A. No.

Q. Is the knowledge that you have and the opinion you have with reference to values such that it would influence you in deciding the issue in this case? A. No.

Q. You don't think so? A. No.

Q. You think you could put that, whatever it is, out of your mind, that opinion, and decide this case and then form an opinion in this case based just upon the testimony and evidence that is presented in court? A. I do.

Q. Let me ask you, do you know Mr. Kolstad?

A. Yes. [28]

Q. You are acquainted with him?

A. I know him, yes.

Q. Just know who he is? A. Yes.

Q. You don't have any business dealings with him? A. No.

Q. Or you have no real close social association with him, visiting at his home, or anything of that nature? A. No.

Q. Nothing in that acquaintanceship that would bias or prejudice you in sitting as a juror?

A. No.

Q. Do you know any reason why at all you couldn't sit in the case and try it fairly and impartially? A. No.

(Examination of the Jury.)

Q. Would the fact that Mr. Kolstad may be a large operator, and that the lands here involved are quite extensive, would that bias or prejudice you in anyway? A. No.

Q. And do you think you could try the case fairly and impartially as to both parties?

A. I do.

The Court: Very well, anything further.

Mr. Galles: Nothing, your Honor.

The Court: Very well, you may step down. The defendants' [29] second peremptory challenge.

(Defendants' Second Peremptory Challenge:
Donald D. Campbell.)

The Clerk: John Schilling.

JOHN SCHILLING

sworn.

Examination

By the Court:

Q. Mr. Schilling, where do you live?

A. Chinook.

Q. What is your occupation? A. Laborer.

Q. Do you own or operate any farm land?

A. No, I work for the county.

Q. You also sat in the trial of the last case as a juror? A. Yes.

Q. Do you have any opinion generally as to the value of land in the Tiber Dam area?

A. No, just——

(Examination of the Jury.)

Q. Just as a result of sitting on the trial of the last case? A. Yes.

Q. That, of course, was directed specifically to the determination of the just compensation in that case, although there was some evidence generally as to other values up in that area. Now, for the purpose of deciding that same issue in this case involving different lands, could you put out of your mind any opinion you may have formed as a result of [30] having sat in the last case?

A. Yes.

Q. You think you could sit in this case, then, fairly and impartially? A. Yes.

Q. And try the case fairly so far as Mr. Kolstad is concerned and so far as the Government is concerned, you think you could do that?

A. Yes.

Q. Would the fact that Mr. Kolstad may appear to be a large and extensive operator and the lands here involved are quite extensive, would that bias or prejudice you in anyway? A. No.

Q. You think he is entitled to, whether he be large or small, entitled to the same consideration at the hands of the court and jury as anyone else?

A. Yes.

Q. Do you know any reason at all why you couldn't sit on the case and try it fairly and impartially? A. No.

The Court: Very well, you may step down. The government's third and last peremptory challenge.

(Examination of the Jury.)

(Government's third and last peremptory challenge: Earl F. Keith.)

The Clerk: Wesley C. Maddox. [31]

WESLEY C. MADDOX

sworn.

Examination

By the Court:

Q. What is your name, sir?

A. Wesley Maddox.

Q. Where do you live?

A. Three miles east of Chinook.

Q. And you are engaged in farming and ranching?

A. That's right, I am in partnership with my father.

Q. What kind of an operation is it?

A. It is irrigated hay and pasture with a small dry land farm on the side.

Q. Are you acquainted with the lands under the Tiber Dam project? A. No, sir.

Q. You don't know the particular lands here involved belonging to Mr. Kolstad?

A. No, sir.

Q. Do you know Mr. Kolstad?

A. No, I don't, sir.

Q. You don't have any opinion as to the value of lands in the Tiber Dam project?

A. Only that of Henry Kolstad.

Q. You sat on the trial of the last case?

(Examination of the Jury.)

A. That's right.

Q. As a result of that, you fixed just compensation for Mr. Henry Kolstad in that case? [32]

A. That's right.

Q. As a result of sitting in that case, and the testimony and evidence presented to you, you naturally came to some opinion with reference to values up there, and there was some testimony with reference to other values in the area. There was no particular reference to the lands involved here, however, in that case, the Clarence Kolstad lands. Now, can you, for the purpose of deciding the same question that was before you in the other case, put out of your mind all of the testimony and evidence and any opinion you may have arrived at in that case?

A. Yes, sir.

Q. You could try this case just as fairly and impartially as you sat and tried the other case?

A. I could.

Q. You would decide the issue in this case just upon the testimony and evidence that is presented in this case?

A. Yes.

Q. Not what was presented in any other case?

A. No.

Q. You think if you are chosen to act as a juror then, you could try the case fairly and impartially?

A. I could .

Q. The fact that he may be an extensive and large operator wouldn't bias or prejudice you in anyway? [33]

A. No, sir.

(Examination of the Jury.)

The Court: You may step down. The defendant's third and last peremptory challenge.

Mr. Wiggernhorn: Could we have a minute?

The Court: Yes.

(Defendants' third and last peremptory challenge: John Schilling.)

The Clerk: Ralph M. Black.

RALPH M. BLACK

sworn.

Examination

By the Court:

Q. Sit down, Mr. Black. Where do you live?

A. Well, just at the outskirts of the city limits in Chinook.

Q. What is your occupation?

A. I am an oil and gas well driller.

Q. Do you own any farm or ranch land?

A. No, sir.

Q. Have you engaged in any farming or ranching operations? A. No, sir.

Q. You sat on the trial of the last case we just finished trying? A. Yes, sir.

Q. Do you have any opinion as to the value of lands in the Tiber Dam area?

A. No, just from the evidence in the other case.

Q. Just as you sat in the trial of the other case and fixed [34] just compensation for Mr. Henry Kolstad in that case? A. Yes, sir.

Q. There was some evidence with reference to

(Examination of the Jury.)

the value of land around there, but there was no reference to this land involved in this case?

A. No.

Q. Whatever opinion you may have, could you put that out of your mind if you are chosen to act as a juror in this case and decide this case just as you decided the first case, and make your decision just upon the testimony and evidence that is presented in this case?

A. Yes, sir.

Q. And follow my instructions, of course, as to what the law is?

A. Yes, sir.

Q. And you don't think that Mr. Clarence Kolstad here would be prejudiced and biased in anyway by having you sit as a juror because of your experience sitting in the other case as a juror? Both Mr. Kolstad and the government would get a fair and impartial verdict from you?

A. Yes, sir.

Q. Would the fact that Mr. Kolstad is a large and extensive operator bias or prejudice you in any way?

A. No.

Q. He is entitled to fair treatment? [35]

A. Yes.

Q. He is entitled to just compensation?

A. Yes, sir.

The Court: Very well. Anything further to ask this juror?

Mr. Schiltz: Nothing.

The Court: Very well, you may step down, sir. The Clerk will call the names of the persons chosen to act as jurors. If you are sitting in the box and your name is not called, kindly step out of the box,

and those whose names are called will take a seat in the box.

The Clerk: John L. King, John Rocks, Lucille Fisher, Bernice Lineweaver, Wesley C. Maddox, R. V. Umstead, Lucille Nash, Ralph Black, Kenneth Jackson, Richard Leighton, George Dielman, Frank Goodian.

The Court: Very well, you may swear the jury.

(Jury sworn.)

The Court: Very well, ladies and gentlemen of the jury panel, those of you not engaged in the trial of this case will be excused from further attendance upon the court until Saturday morning at ten o'clock. Be back at that time.

Now, I might tell the witnesses and spectators, as you have noticed in the trial of the case preceding, that I continually during the course of the trial instructed the jury not to discuss with each other or anyone else, nor permit itself to be addressed by anyone concerning any of the issues [36] of the case. Now, because our quarters are close up here, I am going to instruct witnesses and spectators and everybody else around that they likewise are not to discuss this case or any of the issues of it or any witnesses, or express any opinions with reference to it in this courthouse. The jurors are out in the hall during recesses to relax for a few minutes, for a cigarette, or do whatever else they want, and they are entitled not to overhear discussions of other people with reference to what they think about the case, and so, if you, or any of you, are reported to

me to have discussed the matter in the hallway in the presence of the jury or a juror, you will be held in contempt of court.

Mr. Galles: Your Honor, witnesses may consult with counsel in the courthouse, of course?

The Court: Yes, they may consult with counsel, but I don't want them in the hallways talking and expressing opinions with reference to anything that goes on in the courtroom. The jury is entitled to that kind of protection, and I am going to give it to them. If it is reported to me that witnesses are talking among themselves in the hallways, or spectators are mentioning anything about the case, they will be brought before me and suffer accordingly.

(Jury admonished; 10-minute recess.)

The Court: You may open for the landowner.

Mr. Schiltz: May it please the court, counsel, ladies [37] and gentlemen of the jury——

The Court: Pardon me, just a minute. Is there a draft here on you? Do you want this door open? Are you all comfortable? Very well.

Mr. Schiltz: I am Jack Schiltz. I am a lawyer in Billings. This is my partner, Ralph Wiggenhorn; next to him is Mr. Kolstad, the defendant in this case; and Mr. Galles, the United States Attorney, and next to him, Mr. O'Connell.

It is my job at this time to explain to you in outline form just what our theory of this case is. First of all, we would like to show you that there has been something of a revolution in agricultural practices in the Triangle Area, which, of course, in-

cludes the area that we are going to be talking about in this case. I might say parenthetically that I have not always lived in the Billings area. I was born 20 miles down the road here at Kremlin where my father owned and ran a lumber yard. I have heard since we left the country in 1923 when he locked the doors, that part, at least, of the reason was that in those days it just wasn't agriculturally economical to operate on a 320-acre homestead. Now, that ties into what has happened here. Since those days, we expect to show you that people like Clarence Kolstad have learned that you can operate with large amounts of machinery, large acreages and get large yields. We want to show you that in the course of this case, and we want to show you it [38] isn't peculiar to Clarence Kolstad, the defendant here, it is a thing peculiar to the whole Triangle Area. We expect to show you, also, that Mr. Kolstad and his wife, who is also a defendant in this case, started accumulating land in about 1929 or 1930, started with a very small tract of land, some four or five hundred acres, and by dint of having superior lands and ability in operating the lands, they have expanded their holdings until now they have something like 17,000 acres in round figures. He has operated that land, as I have indicated, with large amounts of machinery because it was economical to operate a farm that way, not for just himself, but for anybody who could accumulate that much land and did accumulate that much land, it was possible to operate in such a way that the custom saved him

money, and, of course, got a larger yield from the property. Since the Tiber Dam condemnation has come along, Mr. Kolstad has been reduced to about half of his original holdings, and now has about 8,000 acres, which is divided up into three separate tracts. We will attempt to show you those are less economical than it was originally, and, of course, we will claim that is an element of damage in this case——

The Court: Just a minute, counsel, let me suggest to you that that in itself will not be an element of damage, only as that may be reflected in the market value.

Mr. Schiltz: I am sorry, your Honor. We believe that [39] you as jurors are entitled to know everything there is to know about the Kolstad property. If some of those things happen to be and appear to be and maybe are to the detriment of Mr. Kolstad, we will show you those, too. We think that you as jurors are entitled to form your opinion of the fair market value of Mr. Kolstad's property before and after the taking for the Tiber Dam on the basis of everything a buyer from Mr. Kolstad would have at his command, all the information that he would develop. We will show you Mr. Kolstad's books, or an analysis of those books, how many acres he farmed, how many bushels he produced, and we will show you everything it will be possible to know, except the labor and the sweat and the heartache that goes into 25 years of putting together an operation such as this is, and

we will support those figures with the testimony of a certified public accountant who has examined the books and income tax returns. Finally, we will produce an expert appraiser who has come in here and appraised Mr. Kolstad's land. We have searched the entire northwest to find an appraiser that we think is big enough and capable enough to appraise 17,000 acres such as these lands, and we think we found the best man as we think we will show you. Finally, I would like to say that when any expert, either on our side or the other side, gives an opinion, I would like that you listen to his opinion, as, of course, you will, but also that you consider the reasons that [40] he has supporting that opinion. Thank you.

The Court: Does the government wish to make a statement at this point or reserve it?

Mr. Galles: Reserve our opening statement.

The Court: Very well, you may call the first witness.

CLARENCE A. KOLSTAD

one of the defendants, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Wiggenhorn:

Q. Will you state your name?

A. Clarence A. Kolstad.

Q. How old are you? A. 50.

Q. And where do you live?

(Testimony of Clarence A. Kolstad.)

A. Chester, Montana.

Q. And you are a farmer? A. Yes.

Q. You are one of the defendants in this case, are you? A. I am.

Q. And your wife is the other defendant?

A. Yes, sir.

Q. And you and your wife own lands that were taken and are here in contemplation or controversy in this case? [41] A. Yes, we do.

Q. When did you first come into that Chester area, Mr. Kolstad?

A. When I was five years old.

Q. Was your father a farmer before you?

A. Yes, he was. He homesteaded in 1910 or 1912.

Q. Was his homestead likewise in the Chester area? A. Yes.

Q. So you virtually spent your entire lifetime in that particular vicinity out there on a farm?

A. Yes, I have.

Q. I take it you profess to know something about farming and are an experienced farmer?

A. I think I do.

Q. Besides your wife, do you have a family?

A. Yes, three boys.

Q. Will you tell us about your family, what they consist of?

A. One boy is 24 years old, one is 21, and one is 12.

Q. You don't have any daughters?

A. No, I'm sorry about it.

(Testimony of Clarence A. Kolstad.)

Q. And those boys, they all live and work with you on the farm, do they?

A. Well, the two older boys do, the other little fellow is too small to work, but he spends some time there. [42]

Q. Where were you born, by the way, Mr. Kolstad? A. Larimore, North Dakota.

Q. Now, you said you had been a farmer all of your life, was that farming of yours interrupted at any time during your life?

A. Yes, I spent about five years in the Sheriff's office at Liberty County and Chester as Under Sheriff from 1930 through 1934.

Q. That would be——

A. About five years.

Q. How old were you during that period of time? A. Oh, about—between 24 and 29.

Q. Did you own any farm before you went into the Sheriff's office?

A. Yes, I was farming before I went in.

Q. How much of a farm did you have in acres?

A. We probably farmed two thousand acres. I probably owned about five or six hundred.

Q. You said, "We probably farmed," who are we?

A. I was operating in partnership with my brother.

Q. Your brother is which one, what Kolstad?

A. Henry B. Kolstad.

Q. Your older brother? A. Yes.

Mr. Galles: If I may interrupt, there are some

(Testimony of Clarence A. Kolstad.)

of the [43] other defendants that were named in this action, and I believe that we did not call out to see if any of them were here being interested in the case. I overlooked that, and I apologize.

The Court: Well, isn't this—this is separated from the others, the remaining portion of the case is continued until Saturday morning at 10 o'clock, is it not?

Mr. Galles: Well, for title purposes, there were others named in these two parcels, some who might possibly claim an interest——

The Court: Only the parcels with reference to Mr. Kolstad?

Mr. Galles: Yes.

The Court: You may inquire, who are they?

Mr. Galles: Amerada Petroleum Corporation; Robert C. Balsam and Mary F. Balsam, his wife; Frank H. Wasson and Blank Wasson, his wife, if any; G. A. Thiel and Blank Thiel, his wife, if any; and Lila Jane MacGowan, on Parcel Ten. On Parcel Eleven, Amerada Petroleum Corporation; Nick Laas, Executor of the estate of Martin Wasesha, deceased; Thomas F. Wallace and Blank Wallace, his wife, if any; and Wells-Dickey Company, a corporation.

The Court: Are any of those persons present, or anyone else claiming any interest in the lands here involved?

Mr. Galles: I move default be entered. I will supply a written motion and order, as well as an affidavit. [44]

(Testimony of Clarence A. Kolstad.)

The Court: Very well.

Mr. Wiggernhorn: Your Honor, so this matter will be clear to the jury in the case, it is understood, is it not, so far as this trial is concerned, it concerns only these two defendants mentioned?

The Court: Yes, I suppose that the land is owned jointly by the two, is that it?

Mr. Wiggernhorn: Well, I'll bring it out in the testimony.

The Court: Yes.

Q. (By Mr. Wiggernhorn): Now, when you went into the Sheriff's office, were you and your brother operating these lands of which I think you said you owned about five hundred acres in sort of a partnership? A. Yes.

Q. And did that continue when you were in the Sheriff's office, or what was the arrangement with respect to your own land?

A. I leased it to him.

Q. And during the five years that you were in the Sheriff's office, did you acquire other lands?

A. Yes, I was buying land all the time.

Q. I neglected to ask you with respect to the five hundred acres you owned when you first went into the Sheriff's office, is that a part of the land here in controversy? [45] A. No.

Q. It is no longer owned by you then?

A. No.

Q. Now, you said you acquired about how many acres during the time you were in the Sheriff's office?

(Testimony of Clarence A. Kolstad.)

A. Well, I presume twelve or fifteen hundred acres.

Q. And is that some of the land that is here in controversy? A. No.

Q. Again that is not the land. Now, you quit the Sheriff's office in what year?

A. In the spring of 1935.

Q. Well, now you might tell us how you or your wife, either one or both of you, acquired the lands here in controversy, and piece by piece as you did acquire them.

A. Well, along about—this place that you have been talking about—

Q. I want to know just what place that is.

A. That's what we call the East place.

Q. I know, but you say this place I have been talking about, I don't remember what I am talking about.

A. The place you have been asking me questions about.

Q. Are you referring now to the place in controversy here? A. No, I'm not. [46]

Q. Well, let's be sure we both understand each other. You might identify it, if you will, please.

A. Well, we call it the East place, this other place. We lived there until about 1942. That is when I first acquired any land that's in controversy.

Q. It is my error, Mr. Kolstad, I have straightened myself out, probably more than you. You are referring, are you not, to 3200, or approximately,

(Testimony of Clarence A. Kolstad.)

acres that is now held, as far as title is concerned, by your three sons, is that right?

A. That's right.

Q. Well, let's go back a moment again, the five hundred acres that you owned at the time you went into the Sheriff's office, is that a part of that 3200 acres? A. Yes, it is.

Q. And the 1500, or thereabouts, which you acquired while in the office, is that also a part of the 3200 acres not in controversy here?

A. That's right.

Q. And so the jury may understand the facts with respect to that what I have referred to as 3200 acres, that is the tract that belonged to you and your wife also, did it? A. Yes.

Q. When did you part with title?

A. 1948.

Q. And to whom did you convey it then? [47]

A. To the three boys.

Q. So, it is still in the family, so to speak?

A. Yes.

Q. But, it is not a part of the 17,000 acres we are going to talk about in a minute?

A. No, it isn't.

Q. Does it lie in close proximity to it?

A. It's about four and a half miles apart.

Q. And you might tell us in passing, do you also operate that at the present time in connection with the other 17,000 acres here in controversy?

A. Yes, we have been operating it all as one unit.

(Testimony of Clarence A. Kolstad.)

Q. But it is not part of these lands that are involved here? A. No.

Q. I might add one thing more about that 3200 acres, while it is owned by your sons, do you have anything to do with the operation of it?

A. I manage it, yes.

Q. You spoke of one of your sons being 24 years of age, is he actually on the place, or what is he doing now?

A. In the summer time he is, but he goes to college.

Q. Where does he go to college?

A. Bozeman.

Q. And what is the year in college now? [48]

A. He has one year left.

Q. He has one year left. He is in the third year in college? A. Yes.

Q. Is he attending the Agricultural College there? A. Yes.

Q. And preparing himself for farming, is that the idea? A. That's the way he feels now.

Q. By the way, he is going to be married in a few days, isn't he? A. Yes, he is.

The Court: Are we going to finish the case in time for the wedding?

The Witness: If we don't, we will have to shut the case down.

Mr. Wiggernhorn: I might say, the boy is considerably worried about it. The twenty-one year old son is not married? A. No, he isn't.

Q. No prospects at the moment, are there?

(Testimony of Clarence A. Kolstad.)

A. No.

Q. Well now, let's continue and get back to the 17,000 acres, and by the way, I have called it 17,000 acres, how many acres did you own of which part was taken?

A. Seventeen thousand and about four hundred. [49]

Q. They are all contiguous, are they not?

A. Yes.

Q. I think I was asking you how, as to times—you didn't acquire that all in one tract, did you?

A. No.

Q. How did you piece it together, would you just give us briefly the pieces as you bought them, one after another?

A. Well, in 1942, the early part of 1942, we bought what is known as two old time ranches, one is the Sailor and the other was the Wasesha Ranch.

Q. How many acres, did you say?

A. Well, between the two, approximately 8,500 to 9,000 acres.

Q. Now, at that time, you and your wife owned the 3,200 acres that you spoke of?

A. Oh, yes, yes.

Q. A separate unit, and you were farming it?

A. Yes.

Q. Were you farming it successfully at that time? A. Well—

Q. Did you have any income excepting from that place with which you could buy this acreage?

A. No, it came from the farm income.

(Testimony of Clarence A. Kolstad.)

Q. Then go ahead, what did you acquire after that?

A. Well, we acquired little 160 and 320-acre tracts, as I went along, I can't recall—— [50]

Q. Individual ones?

A. Individual ones, and then in 1945, fall of 1945 we bought what was known as the Turner Ranch, which was directly west of the property we already had, and joined it.

Q. And joined it?

A. Yes, and that consisted of about, oh, I think between six and seven thousand acres.

Mr. Wiggernhorn: Can you all hear the witness as he is talking? Any difficulty about it?

Q. Be sure to speak up loud enough, Mr. Kolstad. How many acres again?

A. Between six and seven thousand.

Q. And was there any more acquired after that?

A. Well, just small tracts. Maybe a half section or a quarter.

Q. And that went over a period of years, did it? About when was it you got your last piece of land out of this total of 17,400 acres?

A. Oh, I think probably three or four years ago.

Q. So it has been a process through the years, as you picked up a piece here and there, sometimes small pieces and sometimes larger ones, until you finally, about three or four years ago, had an entire unit together, which you have described to us?

A. Yes. [51]

Q. Now, have you had prepared, Mr. Kolstad, a,

(Testimony of Clarence A. Kolstad.)

let us call it a map of this entire ranch so that the jury may see how it lies on the ground?

A. Yes, I have.

Mr. Galles: I wonder if we could have it identified without the view of the jury? Perhaps it could be turned away from their view until it is received in evidence.

The Court: Mr. Galles, can you agree on it, or will there have to be a foundation laid?

Mr. Galles: I haven't seen it before.

The Court: Well, take a look at it, and maybe one of your witnesses, or some of them. You might want to have them look at it.

(Mr. Galles examines map.)

Mr. Galles: Your Honor, with the foundation of a few questions by the witness' counsel on how it was prepared and when, we can agree.

The Court: Very well.

Mr. Wiggenhorn: May it be turned around so it can be seen?

The Court: Yes.

Q. (By Mr. Wiggenhorn): Can you see that, Mr. Kolstad? A. Yes, sir.

Q. There is now posted upon this board a map which has been marked as Defendants' Exhibit No. 1. Will you state whether or not this map correctly depicts your—in its general outlines and all of the colored matter on that map [52] as distinguished from the white, depicts and shows by legal subdivision the land you refer to as the 17,400 acres ap-

(Testimony of Clarence A. Kolstad.)

proximately that you owned at the time the lands were taken by the government in this action?

A. Yes, that is a description of it.

Q. And there are, as I observe here, numerous colors, that is, the land is marked in different coloration, and is there a key to this map, a legend——

A. Yes.

Q. ——shown at the bottom, with respect to these colors, so that anyone examining it can determine by reference to the legend what these respective colors depict and show? A. That's right.

Q. The first one then, I notice is a red color, let us call it, and that is marked "tillable," is that correct? A. That's correct.

Q. And does all of the portions of this map that are in red correctly depict the location of the ground of your operation that is tillable land?

A. Yes, it does, as close as I could come to it.

Q. Now, let's understand what you mean by tillable. I understand that does not include actual cultivated land?

A. No, that is land that can be plowed and farmed.

Q. So, maybe we had better next go to cultivated land, what color is that represented by? [53]

A. Blue—no——

Q. Well, isn't it black?

A. Black on the cultivated.

Q. You told me once before you were slightly color blind?

A. I'm too far away without my glasses.

(Testimony of Clarence A. Kolstad.)

Q. This is blue (indicating). I think the black is—— A. That's right, black.

Q. And it is so shown on the legend, is it not?

A. Yes.

Q. I think there it is called what?

A. Plowed.

Q. The word "Cultivated" nowhere appears on the legend, it is called "Plowed"?

A. That's right.

Q. But that means it is actually under cultivation, and was at the time of the taking?

A. That's right.

Q. And then we find in the next color blue what is called bottom land on the legend, and what does that represent?

A. That's the river bottoms along the Marias river and also along Willow Creek.

Q. We might locate these respective streams. I see here meandering across the southern portion of this map, Exhibit 1, what is intended to be a river. Is that the Marias River?

A. That is the Marias River. [54]

Q. And over here to the right is another line, that is, not a parallel line, but is an individual line. What stream is that, if any? A. Willow Creek.

Q. And Willow Creek joins and flows into the Marias River somewhere near your place?

A. Right down there (indicating). In fact, I own the mouth of it.

Q. You are pointing to it on the map here on the southeast corner of your map?

(Testimony of Clarence A. Kolstad.)

A. That is right.

Q. Your lands extend right to the juncture of those two streams, does it? A. Yes.

Q. All right, let's go ahead, then. The blue is marked "Bottom Land," that is what I am pointing to right here so you and I agree what is blue?

A. That's right.

Q. You might tell us what you mean by bottom land?

A. Well, it is the bottoms down in the river, the flat bottoms. Some of them are clear and some of them have brush on them, but it is the level portion before you go up into the breaks, the level portion down at the river bed.

Q. You might elaborate a bit more. What I would like to have the jury understand is the topography of both the Marias [55] River and Willow Creek insofar as it recedes, as the land gets away from the bottoms itself. Are there benches there of some sort?

A. Well, there is the bottoms first that are close to the river, and sometimes there is a little ledge and then a second level before you get to the river breaks, which are rough, of course, and then on up to the top land. There are quite a few benches in that blue color.

Q. And along the Marias River as well as along Willow Creek, are there also some irregularities, bluffs, and things of that sort? A. Oh, yes.

Q. What is the nature, generally, of these bot-

(Testimony of Clarence A. Kolstad.)

toms, of this bottom land, is it brushy and willowy and trees in it?

A. Some of it has trees and some of it is fairly clear, but it is all level land, it is bottom land.

Q. It is the sort of land that you find characteristically and typically in Montana, and in this particular region of Montana, where there are streams?

A. Well, along the Marias and Missouri Rivers anyway. Those are the ones I am most well acquainted with.

Q. What did you say about the Missouri?

A. You find it typical of the Marias and Missouri Rivers.

Q. Is this bottom land cultivable or land that can be farmed? [56]

A. Certainly, it is land that can be irrigated and put into alfalfa.

Q. Did you in fact have some of it irrigated?

A. Yes.

Q. Well, we will probably go to the next classification, then. I will jump down one and I will call it orange, and it is marked here "Alfalfa." Did you have some of this land in the bottom land that was in alfalfa?

A. Yes.

Q. At the time of the taking? A. Yes.

Q. And that is marked in orange, is it?

A. Yes.

Q. And you can readily find it on the map here?

A. Yes.

Q. That alfalfa land that you have there, you

(Testimony of Clarence A. Kolstad.)

spoke of it as being irrigated. Was it all actually irrigated?

A. It was all ditched. I wasn't irrigating it for the last two or three years.

Q. Was some of it subirrigated thereon?

A. Subirrigation. You didn't really need to irrigate it.

Q. But you had in the past irrigated it when it was required?

A. I did, yes. It was all ditched and ready to go.

Q. Well, you might explain what you mean by subirrigated? [57]

A. Well, the moisture from the river bed was high enough up to the level of the ground that the alfalfa roots reached it.

Q. In other words, that was characteristic of this bottom land? A. Yes.

Q. While we are at it, will you also locate such improvements in the nature of buildings or structures that you had on the land at the time of the taking? Maybe you had better come down here and point that out. Step over here where I am.

A. What do you want to know?

Q. I was asking where your buildings are located?

A. There was a set of buildings that we used for the wheat farm——

The Court: You will have to speak up, Mr. Kolstad, so that we can hear it over on this side, too.

Q. You are now pointing at what is marked here with a square in—let's see if I can locate it.

(Testimony of Clarence A. Kolstad.)

A. Section 32.

Q. 32. Township and range, please?

A. 31 North, range 4 East.

Q. I might pause just a minute, Mr. Kolstad. In what county or counties is this land located?

A. Toole County and Liberty County. [58]

Q. Where is the county line?

A. Right down there (indicating).

Q. You are now pointing to approximately the middle of the map, are you not? A. Yes.

Q. So that line almost bisects your farm, does it?

A. Yes, that is true.

Q. There is a substantial amount of your land on both sides? A. Yes.

Q. Liberty County is to the east or right of it, and Toole County to the left? A. That's right.

Q. Well, now, let me get back again to this point you indicated here, that would be in Liberty County?

A. Yes.

Q. It is where your buildings were located for what purpose, for what use?

A. Mostly for farming. It was centrally located to the fields around.

Q. Did you have any other central location of buildings?

A. We did have down here in Section 24 (indicating), just over the line in Toole County, we had a complete set of ranch buildings there.

Q. And those were also used as a headquarters for your [59] ranching operations?

A. Yes, they had been in the past.

(Testimony of Clarence A. Kolstad.)

Q. Are there any other improvements—where—were there any bridges across the Marias River that are important for reference points?

A. Yes, right here (indicating) was what we call the Turner bridge.

Q. You are pointing to what, what location?

A. Well, it is in Section 14.

Q. Toole County?

A. Yes, 30 and 3. It is what is known as the Old Bootlegger Trail. It comes down here (indicating)——

Q. Following the road now that you are pointing at?

A. Yes, coming down here (indicating) from Galata and going over through here (indicating).

Q. It is shown on the map, isn't it?

A. Yes, and you went down and crossed the bridge and on to Great Falls.

Q. Right along through your bottom land, your alfalfa?

A. Yes, right along through the alfalfa.

Q. Was there any other point of crossing in Willow Creek, or along Willow Creek, commonly used by you in handling your entire ranching operation with machinery?

A. Yes, we had two crossings for machinery there, and then we had a bridge. [60]

Q. Now, you are pointing, when you said two crossings, to what location? One is near the buildings, isn't it?

A. Yes, and there was another one a little wider

(Testimony of Clarence A. Kolstad.)

to cross with wider equipment, and then there was the bridge across the creek.

Q. That is on the——

A. That is the road that comes down.

Q. You are now pointing to what line? Is that a section line?

A. That is a section line.

Q. Between Sections 16 and 17, and the corresponding sections on the way down. These crossings that you referred to, were those in the nature of fords?

A. Well, yes. Of course, your summer creek doesn't run only very shallow, and eventually stops entirely, but we always cross the equipment through the summer creek.

Q. What do you mean? Maybe we should know something about these two streams you have described. The Marias River, is that a year around river that flows the year around?

A. Yes.

Q. It flows into the Missouri?

A. That's right.

Q. That carries water all through the seasons, all year around?

A. Yes, it never goes dry. [61]

Q. And what about Willow Creek?

A. Well, it always runs in the spring, probably until about the 4th of July, sometimes earlier, and sometimes it runs later, but the average for it. It empties in the Marias River here (indicating); but it has springs in it so that it never really goes dry, there is always good water holes all the way through it, probably every half mile or mile, which can be made—it never goes dry. You can take the bulldozer

(Testimony of Clarence A. Kolstad.)

and go in there and doze it out six feet deep, and it will fill up again with water, the water level is that high. It has always been good stock water.

Q. Now, I see the green designation here in your legend is marked "Grazing." Now, will you point out generally where the grazing land is?

A. Yes, up along the river breaks, what we call the river breaks. They are that far away from the river (indicating), almost a mile, most of them. This is all, most all of this (indicating) is river breaks, not suitable for farming, but good grazing land.

Q. How does that compare with grazing land generally in the vicinity of Chester and that neighborhood?

A. It is all about the same, I think.

Q. Is it considered good grazing land for livestock?

A. Yes, very good, good winter range.

Q. And with respect to these two streams you have spoken of [62] here, were they accessible to the grazing land so the cattle could get, if they were grazing upon it, to water, either in the river or Willow Creek?

A. Oh, yes, those breaks aren't that rough. They are not steep bluffs, they are just rolling hills. There are some steep bluffs over here in places (indicating), but you notice this white land, that belonged to the government. No landowner ever owned it. I leased it, though, from the government.

Q. Before we go to that, maybe I better—before I do that, may we refer to this sheet such as I am showing you here as an overlay?

(Testimony of Clarence A. Kolstad.)

A. That's right.

Q. You will know what I mean when I use that word. It is a transparency, as are the others. I will ask you, that appears to have markings or colorations of gold, and shall we call this bronze?

A. Good enough.

Q. What do these gold areas represent?

A. That is United States Government land.

Q. And these others, the bronze?

A. These two are school sections, and this is state land also (indicating).

Q. You are speaking now again of bronze?

A. Yes. [63]

Q. So all in bronze indicated on the legend here (indicating) is state land, and the gold, if that can be called gold, it isn't particularly gold, I know, is United States Government land? A. Yes.

Q. Now, in addition to what you have shown here, do you have any rights upon any of those lands at all? A. Well, I have them leased.

Q. They are leased. Now, I think we made a mistake in this map, so let's correct it. Do you show anything on this map that is not in fact leased by you?

A. Yes, this piece here (indicating) is outside of mine, the map is wrong there, and this piece here is not leased by me (indicating).

Q. So they really shouldn't be on this map at all?

A. No.

Q. Insofar as this gold represents United States Government land leased by you, it is correct, except-

(Testimony of Clarence A. Kolstad.)

ing for the two pieces you have indicated, two pieces, one of them on the east portion of the land about the center of the map, and the other one the southeast portion of the map, is that right? A. Yes.

Mr. Galles: Would it be possible for him to write on those two pieces?

Mr. Wiggenhorn: Let me see, mark the word "out" on it. [64]

(Witness does as requested.)

Q. What about this one (indicating), is that all right or not?

A. I have got part of it. I don't just exactly know where. You can mark it out if you want. When we fenced, we followed the least line of resistance between the two.

Q. On that portion which is gold and on which you have written the word "out"—there is separate units of it—that is not leased by you although it is government land? A. Yes, it is.

Q. As to the bronze portions, again referring to them, they, I think you told us, were state land, and in all three cases, you have leased them?

A. Yes.

Q. No error about that, is there? A. No.

Q. And those leases were in effect at the time the lands were taken from you?

A. Yes. They are still in effect.

Q. Just one minute more and see if—I happen to notice another color here. What do you call that, black, is that it?

(Testimony of Clarence A. Kolstad.)

A. Black, yes. You are color blind, too.

Q. I resent that. That we identified before as plowed, and that means, of course, it is [65] cultivated?

A. Yes.

Q. And underneath that, we have an orange, or is that yellow?

A. Well, I would say it was yellow.

Q. Okay, yellow. That is marked "Breaking." Identify portions of it on the map, will you?

A. This part on here (indicating).

Q. What do you mean by "Breaking" when you so mark it?

A. It is newer ground. It has all carried one crop, and some of it two.

Q. It hasn't been in cultivation for a long period of time?

A. No.

Q. You saw fit to distinguish it from the cultivated land that has been cultivated and producing crops, or has a history of producing crops?

A. Well, I did it for my own convenience so I could identify it.

Mr. Wiggernhorn: It is 12 o'clock. Shall we suspend, your Honor.

The Court: Very well. (Jury admonished.) Court will stand in recess until two o'clock.

(Noon recess.)

CLARENCE A. KOLSTAD

Direct Examination

(Resumed)

By Mr. Wiggenhorn:

Q. This entire property that is exhibited here in your [66] Defendants' Exhibit 1 that you have described to us and the manner in which you acquired it, is that operated as a family between yourself and your wife, or in what fashion do you operate?

A. We operated it with the same unit. The boys—we operated it all in one unit, the 3,200 acres that are over east of that, and this acreage here (indicating).

Q. You might explain what the ownership of your wife is, and your own ownership with respect to this 17,000-odd acres shown in Exhibit 1.

A. Well, in the beginning in 1942, when I first bought it, we bought two ranches, as I testified to. My wife bought what was known as the Sailor ranch, and I bought what was known as the Martin Wasesha ranch, so that she owns that in her right, and I own the other one as we purchased it, and the Turner ranch that we bought later, we bought it in joint tenancy.

Q. Well, substantially, without going into the exact details of it, then, your wife owns approximately half of the land and you own approximately half?

A. That is close enough.

Q. Some of it in joint tenancy and others individually owned by her and individually owned by you?

A. Yes.

(Testimony of Clarence A. Kolstad.)

Q. And while it is probably not important, but when you say [67] that your wife bought one ranch, that was bought with her own money?

A. Yes, it was.

Q. It was actually her ranch? A. Yes.

Q. It wasn't just a husband and wife deal where you had it deeded to her in her name? A. No.

Q. Bought with her own money.

The Court: Counsel, may I inquire, are we going to run into a problem here in connection with what we have in conference discussed? There being separate ownerships, I wonder if maybe we shouldn't have a further conference?

Mr. Wiggenhorn: Whether we had a conference on it or not, we should have an understanding, I suppose.

Mr. Galles: I just suggested to counsel, your Honor, that we could stipulate that one award could be made for the ownership, even though it is owned separately or jointly, as the case may be.

The Court: You are not going to object to evidence, then, either, with reference to its use.

Mr. Wiggenhorn: I believe we had a——

The Court: Maybe we had better have our discussion outside of the presence of the jury. (Jury admonished.) Kindly step out of the [68] Courtroom.

(Jury withdraws from courtroom.)

The Court: Mr. Wiggenhorn, when we were discussing it, I understood this was one ownership, and

you had suggested to me some of the proof that you were going to make, and, of course, I don't see how it is possible, except by stipulation, to permit you to show a value of a 17,000-acre tract, if it is only 11,000 acres in the one ownership.

Mr. Wiggenhorn: Well, technically, that is correct. Straighten me out if I am wrong, Mr. Galles. Maybe tentatively, maybe by word or understanding, but I got the impression, at any rate, when we entered upon the trial of the case because of something that occurred at the very beginning, that we were going to try this as if it were one ownership, a family unit, with one award interchangeably with respect to the two defendants without any distinction between them at all. Is that wrong, or is it right?

Mr. Galles: Well, I was thinking that the award should cover all of the property, but I didn't have the understanding that the unit rule would apply to the separate ownerships. In fact, I hadn't given it too much consideration. I do recall that we had a talk about it.

The Court: Well, you see, the matter just occurred to me because I thought this was one tract and one ownership.

Mr. Wiggenhorn: I am frank to confess to the Court that I am not able to state which belongs to which. [69]

The Court: Well, I know, but we are going to have to find out.

Mr. Wiggenhorn: I am frank to admit that from the beginning we were going to try it as though there was a unity of ownership, as a family unit. I don't

mean to suggest to the Court that this is completely sound, but it occurs to me where it is a husband and wife deal and operated as one unit, and a partnership return made here——

The Court: Well, you may have a partnership for the operation of the ranch, but you don't have a partnership in the ownership of the land.

Mr. Wiggenhorn: Well, if it is a partnership and each partner dumps in his holdings, even if there is an agreement——

The Court: Yes, but he can withdraw them at any time. I am just at a loss here to understand how we can proceed. Let me say this, are you employed by Mrs. Kolstad, for example? She doesn't seem to be here.

Mr. Wiggenhorn: That is true. Again, so as not to deceive the Court, I am told by Mr. Kolstad that I am employed by her. I never met Mrs. Kolstad personally.

The Court: Well, it is a little difficult. I don't know how I can—in other words, I have some responsibility here, too.

Mr. Wiggenhorn: I should probably say I am employed by Mrs. Kolstad, because I think in the matters we had pending [70] in Butte, she signed the request for withdrawal of one counsel as the substitution of our names as attorneys for herself as well as Mr. Kolstad.

The Court: Well, you can see what your situation is, however. Just assuming these figures, that this is a 17,000 acre tract altogether, and Mrs. Kolstad owns 5,000 acres of it, then you have one five

thousand acre ownership and one 12,000 acre ownership, and we have got two cases here.

Mr. Wiggenhorn: I should suppose—again maybe I am not too practical, and I full well appreciate what the court has suggested that a partnership is subject to dissolution at any time upon the whim of either partner, but as long as it is in existence and continuing, it isn't dissolved and it is subsisting, and partners can, of course, arrange between themselves that they shall share in the profits. Now, I appreciate the problem the government is concerned with here. This award should be made according to the ownership, but on the other hand, if again the partners are in agreement that whatever the award is for their lands, whether belonging to one or the other, should go into the partnership pot, that should satisfy any——

The Court: Well, that would satisfy the government with reference to what happens to whatever money they get, but the question here is what money do they get. Now, as I understand what you suggest, you are going to prove that because [71] this is what you call one unit, it has a peculiar value upon the market.

Mr. Wiggenhorn: It has a greater value.

The Court: Now, as I understood it, that is what you were going to prove, this is one. Well, now, if the fact is that it isn't one, I can't close my eyes to that and say, "Well, let's pretend it's one."

Mr. Wiggenhorn: But it becomes one, doesn't it, when Partners A and B join forces and operate it as one?

The Court: I don't think so.

Mr. Wiggenhorn: I should think it would be one just as much as any other partnership that owns property.

The Court: Well, you could take—the partnership may—you don't have to have a partnership if that is true, skip it. It's possible to have a partnership. You could take every ranch in the county and say, "Well, now, if all of the individual owners here got together and formed a partnership, they could operate it more economically, and that would be reflected then in the market value, so let's just value the whole county."

Mr. Wiggenhorn: Well, if we carry it one step farther, and neighbors A, B, C, D, all join forces and decide they will operate as one unit and operate it as one unit, even to the extent of possibly issuing shares against what have you, evidencing their ownership in the unit, once it is dissolved, [72] why it goes back to them, but in the meantime, while they are operating as one unit, they get the benefit of unit operation, and the value is accordingly.

The Court: There may very well be a situation in which parties join as you suggest and issue shares, which upon the dissolution of the association, the property might go back into the individual ownership, but there would then be legal title in the association, and you would have but one unit, that is, one legal title. I am at a loss to see how you are going to proceed further under the theory that you have. We can try these two cases here, of course, but we can't try them under the theory you have if they

are separate units. You will have to show me some authority. I can't otherwise understand how it can be done.

Mr. Galles: Your Honor, my suggested stipulation was just as to the division of the award, and not as to ownership. The division of the ownership does create a definite problem as to the unit ownership of the various units that are then left or being taken insofar as it affects the market value. In this situation, you would have to have a unity of agreement between the buyer and seller to sell their joint ownerships when there is no guarantee that that agreement can be reached.

The Court: Well, it is just a situation I don't understand. You see, when you take two separate ownerships, and say, "Well, if we operate them together, we have a better unit, and thus [73] a unit which has a different market value," we are just dealing in speculation, and dealing in business profits and personal considerations that are not admissible or not part of the legal concept of market value.

Mr. Wiggenhorn: I must confess, your Honor, that whether justifiably or not, I am not attempting to say, I entered upon the trial of the case and came here to try it with my own conception that we were going to try it as one unit.

The Court: Yes.

Mr. Wiggenhorn: I doubt if counsel himself has given thought to it.

Mr. Galles: That's right.

The Court: Well, that is what I say. It seems to me that neither one of you have given thought to it. I have raised the question. I don't think that either one of you thought of it.

Mr. Wiggenhorn: Frankly, one thinks of husband and wife as one person. I am not so sure—I, therefore, did not brief it. I am not willing to confess for a moment that I might not be able to find authority and justification for trying it just as we are trying it now. Had I been confronted with the problem, had I thought it was a problem and would have been a contested one, or might have been contested, and had I not been, rightly or wrongly, lulled into the idea we [74] were going to try it as one unit, why I would have briefed that as one of the most important points in the case.

The Court: I would think so.

Mr. Wiggenhorn: And I would have been prepared to argue it.

The Court: I would think so, because immediately upon the fact coming to my attention, I immediately thought it was the most important matter raised in the trial of any case that we have had here.

Mr. Wiggenhorn: I would really not impose myself on the court to attempt to argue the matter. I am only arguing it on a common sense basis. I have nothing to back it up with.

The Court: No, I know. I am just about in your same position, counsel, except that I do have to make a decision whether I have got any authority or not for it. That is the position I am in. Now, it being im-

portant, we are going to save ourselves a lot of time to find out right now.

Mr. Wiggenhorn: It is important for more than just the moment, too, because if we commit error either way, why——

The Court: Well, what is the use——

Mr. Wiggenhorn: I am frank to say I don't want to commit error myself, because I don't want the case appealed.

The Court: That's right. Well, I don't care about it being appealed, but the fact is, we would have to try it again, and [75] that is what I don't want to do. I take no pride in always being right or that I not be reversed. What I want to do is protect myself and you and the people involved from having to go through all this once again, so it would seem to me that probably what we have to do is take a recess and look at the books.

Mr. Wiggenhorn: I think we should.

The Court: Well, we had better call the jury back in to do that. What do you think, should we recess for the rest of the afternoon?

Mr. Wiggenhorn: I guess probably we can't do it justice without that.

The Court: All right, bring them in.

(Jury returns to Courtroom.)

The Court: Ladies and gentlemen of the jury, a problem has arisen concerning which I have to make a decision, and I have asked counsel to spend some time looking at books to assist me, so we will have to take a recess in the trial of the case, so you are ad-

monished once again by the court not to discuss the case with each other or anyone else, nor to permit yourselves to be addressed by anyone concerning any issues of this case. Do not form or express any opinion in the matter until the case is finally submitted to you——

Mr. Wiggernhorn: It just occurred to me, if we could recess until four o'clock, it might be possible we might [76] arrive at some solution at that time, and it would probably be possible——

The Court: Well, that is inconveniencing the jury. If we are going to recess for that length of time, they might as well have the rest of the afternoon off and maybe they can do something in the afternoon. You are excused from further attendance upon the court until 10 o'clock tomorrow morning. Be back at that time. Court will stand in recess.

(Thereupon, a recess was taken until 10:00 o'clock, a.m., the following morning, December 13, 1956, at which time the following proceedings were had in the absence of the jury:)

The Court: Proceed.

Mr. Wiggernhorn: May I proceed?

The Court: Yes.

Mr. Wiggernhorn: At this time, because it now appears that it is necessary in the trial of this proceeding to establish and separate the identity of the precise lands owned by each of the defendants individually and as well as those held by them in joint tenancy, and through mutual mistake of the parties plaintiff and defendant, it was assumed that defend-

ants' individual ownership could be ignored, and for the purposes of determining their just compensation, their ownership could be treated as a single unit, and the witnesses of both sides are not prepared at this time to testify with respect to damages to each individual owner, and [77] will require time to prepare themselves to so testify. The defendants now move that the further trial of this proceeding be recessed for continuance of the trial at such date as may be fixed by the Court, the present jury to be excused and ordered to return for completion of the trial at such time. Now, may I have a few moments, your Honor, to explain my thinking——

The Court: Yes.

Mr. Wiggenhorn: ——and reflections on the way this thing now appears to me. I can make some confessions and admissions that are good for the soul. I believe, to start with, we have to be careful, and I confess I for one have not fully appreciated that——by the way, you won't have to take this, Mr. Reporter.

The Court: Well, we report everything in the Federal Court, counsel.

Mr. Wiggenhorn: I may be talking too fast. What I was trying to tell your Honor was that it is necessary and important at the very outset to distinguish between the taken lands, the lands taken, and the identity of those lands, and the lands that are left to the parties, if any, and that is something that I had not been thinking about, and I believe probably when counsel for the government and myself had this bland understanding, and I think we

both acted in good faith, and both thought we understood one another, and we did, [78] neither of us, at least I am speaking for myself alone, gave distinction to the fact that it is important and distinction must be noted, for the reasons I am about to point out, between the lands left to these defendants for which we are allowed to claim severance damages and the lands taken. Now, I am free and frank to confess to your Honor now, and I'll clear that up so that there will be no misunderstanding, that with respect to the lands remaining to these defendants, I fully agree with your Honor's conception of the matter called to our attention yesterday, that there can be allowed no confusion as to the identity of ownership with respect to those remaining lands. In other words, if there is any severance damage in this case on the part of defendants, it has got to be individual severance damage on the part of each of those defendants, and it has got to be so determined, it cannot be treated as a whole, even, as your Honor suggested, were there agreement to that effect.

It is quite a different thing, as I view the matter, with respect to the identity of the lands taken. In the first place, the statute itself under which we are proceeding makes clear what may be done in a case of this sort. I don't have them here, Mr. Galles, but I have some notes on my own, and if this wants to be verified, it can be done. I am reading only from my notes. The statute provides, and I may read some portions that are not completely in point—— [79]

Mr. Galles: Pardon me, is this 71(a) or——

Mr. Wiggenhorn: This is Section 40, 258(a),

“The petitioner may file with his petition a declaration of taking signed by the authority empowered by law to acquire land, declaring that said lands are thereby taken for the use of the United States. Upon the filing of this declaration and the deposit in court to the use of the defendant of the amount of the estimated compensation stated in said declaration, title in said lands in fee simple shall vest in the United States, and said lands shall be deemed to be condemned and taken for the use of the United States”—and I am quoting now—“and the right to just compensation for the same shall vest in the persons entitled thereto.” That is the end of quote, and just compensation shall be ascertained and awarded in said proceeding and established by judgment therein. Now, the proceeding here, and by the way, I am frank to confess I have not the complaint, and I think counsel will understand why I don’t have, because I haven’t been in the case until recently, but I suppose it proceeds on the same basis as the notice, which I do have before me proceeds, and the notice refers, and you can correct me if I miss anything here, Mr. Galles, the notice, in the first paragraph, notifies the defendants that the United States—that this is an action to condemn certain property described in schedule “A,” and, of course, schedule “A,” it would [80] appear, is nothing more than the land description, “attached hereto and made a part hereof, for use in connection with Tiber Dam and Reservoir,” and so on. Now, then, continuing, we find on the second page just before the separate

parcels are described, the notice continues, "You are further notified that the persons having or claiming any interest, or who may have or may claim an interest in the property described in schedule "A" hereto attached, whose names are ascertainable by reasonably diligent search of the records, and those whose names have been otherwise learned of." There follows then, the names—I should continue, "Parcel No. 10" are the next words appearing, in other words, it is by lead or heading of what is referred to in the previous language. In Parcel No. 10, the names of those owners appearing are C. A. Kolstad, also known as Clarence A. Kolstad, and Alta A. Kolstad, husband and wife. Now, then, I take it that those other names appearing are the ones that counsel read at the outset of the case as to defaulting for failure to appear. But the point of interest and importance here is that we are told here now that as to this particular parcel—and let's be sure now what we mean by the parcel, it is the parcel taken, it is a piece of ground about 9,000 acres altogether, it is a parcel, and as to that, the owners are these two individual defendants. It is not stated that there is diversity of ownership. We are merely advised, [81] and, of course, there could be no particular reason why it shouldn't be done—that these two people own the land in some manner or other, and they are the ones that are here appearing to defend. Now, it is my contention that insofar as ownership is concerned, or to carry that on through, insofar as any compensation that may be awarded to these defendants is concerned, that that is a matter that the

United States has elected in this action to ignore, if there is any diversity of ownership.

The Court: Do you have any authority for your position?

Mr. Wiggenshorn: Well, I think I have, yes. By the way, I want to say I take the view, before I refer to this, I take the view that it is entirely up to the defendants themselves, once—I maybe better announce my position so your Honor will understand it. I think that we are arguing about something that is completely inconsequential, and is a matter concerning the defendants only. Suppose we had complete diverse defendants, two or more, half a dozen, A, B, C, D, they were all strangers to each other, and each of them owned in some manner individual portions of the part of the land taken, and that is the part we are referring to here, and supposing they didn't see fit—there is a proceeding provided whereby they may assert their rights, as I take it, as I understand it—but supposing they didn't see fit to worry about that at all, it was quite agreeable to them that the [82] jury, who are making the determination here, make one determination, one figure for just compensation for the parcel, for the parcel mind you. Now, if they wanted to take that pot of money among themselves and walk out of the courtroom and distribute it as they saw fit among themselves, the government would be fully discharged once the government has paid the money in response to the finding of just compensation, and what they do with it, or how they divide it wouldn't worry the

plaintiff at all, so long as the plaintiff was discharged.

The Court: Counsel, I personally think you misconceive the thing entirely. The parcel that is taken by the government is just the government's determination of what they want to put in one taking. It doesn't have to be all of the land taken, and after the government sets forth the parcel and after the case comes before the court, I can now separate these separate ownerships and have a separate trial on each one of them.

Mr. Wiggenhorn: As to the one parcel?

The Court: Of course.

Mr. Wiggenhorn: I wouldn't even argue the point with you, but the point I am making is——

The Court: That is what we are going to do with part of this, as a matter of fact, and you have agreed that it be done. [83]

Mr. Wiggenhorn: No, that is not quite right, your Honor. We have another case.

The Court: Pardon me, parcels within the case, you mean, those are separate parcels.

Mr. Wiggenhorn: I want this to be made clear: There is another parcel of land, Parcel No. 11, which counsel and myself had agreed we would try in this action. As to that, I was going to mention it before I got through.

The Court: Well, the fact remains, counsel, that in the trial of this kind of a case, you can have a parcel, as you call it, a description of a vast amount of land, in which there are separate ownerships, 10 different ownerships. So far as this court is con-

cerned, and so far as the law is concerned, I can make 10 cases out of that.

Mr. Wiggenhorn: I don't challenge that. I am merely attempting to point out that whether your Honor would be so disposed or not, that so far as the government is concerned, so far as anyone is concerned with the trial of the action, the only one who could be hurt would be the defendants, and if they don't assert it, if they don't ask for it, and if they are perfectly willing to take the money that is received in payment of just compensation among themselves in one jackpot——

The Court: Well, I think you misconceive the purposes of this court, too, then, because the Court has to, in the first [84] place, find that these are the owners. I can't. I am not going to sit up here and try a case and permit a jury to grant compensation to somebody who is not an owner.

Mr. Wiggenhorn: Yes, but they are owners of some part of it.

The Court: These happen to be the owners of some part, but I am not going to permit a jury to grant compensation to them for a taking of which they are not the owners. Now, what is the purpose of this? In other words, do you want the court to take the position that insofar as your proof is concerned, you can enter proof as to one parcel?

Mr. Wiggenhorn: I am probably premature, but I didn't want any misunderstanding when we come back here.

The Court: Well, I am glad you don't because if

that is your position, we are not going to have a continuance.

Mr. Wiggenhorn: My position is this: That when we do resume the trial of the case, what would ultimately follow from my conception of this would be that the question of value of the lands taken would be in one unit, that would be determined in one unit. The question of severance damages would have to be individual.

The Court: Well, unless—do you have some case authority for me? I would be glad to look at it.

Mr. Wiggenhorn: Well, of course, your Honor has almost indicated it would be useless for me to suggest it. [85]

The Court: Suggest what?

Mr. Wiggenhorn: That I have any case or any authority for it.

The Court: Well, no, I am telling you what my view is, I haven't ruled on it yet. If you will give me a case, I will be glad to read it.

Mr. Wiggenhorn: Well, possibly the statute itself will throw some light on it. I suggest—I am referring now to the rule, 71(a), would throw some light on it as a matter of procedure.

Mr. Galles: Well, that, your Honor, I think, is the distinction. One is the procedure where any amount of land can be included in one action regardless of ownership, and the other matter is one of proof so we can arrive at fair market value.

Mr. Wiggenhorn: It is a matter entirely of proof. I wanted to be sure when I returned here, I wouldn't have any misunderstanding.

The Court: Well, just so you understand what my position now is, and that is that separate owner-ships will have to be tried separately, that is, we can try them all at one time like consolidating cases for trial, but I don't conceive that it is possible for all of the owners within a parcel, just because the government has named a parcel, artificially named it, that all of the owners in that parcel may proceed to [86] show a joint operation, or joint—one compensation.

Mr. Wiggernhorn: May I suggest this, your Honor?

The Court: Yes.

Mr. Wiggernhorn: I think I understood what your Honor has indicated that if it were to be otherwise, why you would proceed with the trial of this action. I will state with regard to that that whatever your ruling is at this time, if you will grant the motion, why I will adhere to that, and I won't ask for any conditions or anything of that sort, but I do not see why when we come to resume trying this action, if I had the opportunity in the meantime to prepare a brief and submit it to your Honor, it would be entirely a matter of the admission of evidence, and then we can preserve our rights at that time if your Honor rules against me on the manner in which the evidence should be submitted to the jury. We can try it at arm's length and we can make an offer of proof or whatever we——

The Court: Counsel, I am here to try the case now, and I am willing to make a ruling.

Mr. Wiggenhorn: Well, I don't believe we have arrived at a time to make a ruling.

The Court: No, that's right, we haven't yet. I raised the question for your benefit, not for my benefit, because from what you told me, it appeared to me you had misconceived, as I view the law, so I raised the point for your benefit, not [87] for mine. I am ready to proceed with the trial. We have got a jury here, we have gone through a lot of time, my time has been occupied, the court's time, counsel, witnesses and jurors, and it is an expensive procedure, and I want to continue the trial. On the other hand, I can appreciate the difficulties that the owner, for example—that is who I am concerned about. I want them to have the opportunity to get just compensation, and I want them to have the opportunity to have that determined, and so, in order to give them that opportunity, I suggested that I might be willing to recess the trial of it, but if we are going to recess it upon the basis that there is going to be another contest as to what my ruling is, I am not going to bother doing that, I am wasting time. I'll rule now. Go ahead and try the case, and I'll rule.

Mr. Wiggenhorn: Supposing your Honor should be wrong?

The Court: Well, that's simple, I'll be reversed.

Mr. Wiggenhorn: Well, I know, but——

The Court: That happens in every case you try, you may be wrong.

Mr. Wiggenhorn: The point of the matter is, I am sure your Honor would want authority, whatever authority there is.

The Court: Well, yes, let me say this——

Mr. Wiggenhorn: I am completely convinced I am right, your Honor. [88]

The Court: Well, of course, every lawyer that ever makes a suggestion, I give him the benefit, I give him credit for saying that he is not trying to mislead the court, he is trying to tell the court what the law is.

Mr. Wiggenhorn: I am also convinced that if I came back here with a brief that I could convince your Honor.

The Court: Well, that may be a different matter, and I would say this: that if you did do that, I would change my ruling, but I don't want to be in the position that if I don't change my ruling you are going to make that the basis of an appeal.

Mr. Wiggenhorn: I don't quite follow the implications of that, but your Honor is not unaware that in the trial of every action, counsel is rebuffed, he has his own theories. When he offers—let's take in the admission of testimony. He offers certain testimony or tries to and objection is sustained. You wouldn't expect him to do other than proceed regularly and make an offer of proof.

The Court: That's right.

Mr. Wiggenhorn: Also, the motion to deny that offer of proof is also granted, as is expected, and then we proceed to take the alternative and offer some other testimony. Now, what I am getting at is I don't want to be foreclosed at this time from searching for authorities and coming back——

The Court: Well, you are going to be, you don't want to be, [89] but you are going to be.

Mr. Wiggenhorn: I want to satisfy your Honor, I really do. My position is that——

The Court: I understand your position clearly. You don't want to be foreclosed, but I am telling you you are going to be.

Mr. Wiggenhorn: I hope you are wrong. My position is this——

The Court: Well, I am not going to listen to any further argument about it. We are going to proceed with the trial of the case, if that is what you want to do. Otherwise, if you want it continued on the basis I have suggested, I will be glad to continue it.

Mr. Wiggenhorn: Your Honor gave me the out a moment ago that if I succeeded in changing your mind——

The Court: If you succeed, why that will be fine, of course, but I am not going to permit you to use that as a basis for reversal of the trial of the case, so you will understand that. Do you understand that, sir?

Mr. Wiggenhorn: I am confused now. I have been over that before.

The Court: Well, if you are confused and you don't know where you stand, counsel, I would suggest that you proceed with the trial.

Mr. Wiggenhorn: Well, may I say this, maybe I can make [90] this thing clear. Do I understand by that that as a matter of good faith when I come back here that if I think your Honor honestly believes

your Honor is in error in ruling against me should you do so that I must not then preserve rights by making an offer of proof?

The Court: That is just exactly right. I say that you have got an opportunity now to try the case on any theory that you want, and I will rule on it.

Mr. Wiggenhorn: May I add one thing more. I think your Honor is under the belief that the situation we find ourselves in here now is my fault.

The Court: Well, I don't know who else's fault it is.

Mr. Wiggenhorn: It is equally counsel's for the government. We had an understanding——

The Court: Counsel cannot be equally responsible. Each one of you has a full responsibility.

Mr. Wiggenhorn: Very well, it is not solely my fault.

The Court: It is so far as your part of the case is concerned, it is wholly your responsibility.

Mr. Wiggenhorn: I will accept that, your Honor, and I won't run away from it either, that is quite true, and I'll tell my client that, too, but I want your Honor to know that I am not the only party, in other words.

The Court: Why quite obviously, counsel, all of you apparently misconceived the law. [91]

Mr. Wiggenhorn: We talked the matter over, and we had a certain understanding.

The Court: Yes, that happens every day, lawyers on both sides don't know what the law is. I am telling you what it is, what my view is. If you want to try the case, you may try it, but I am not going to fool around and go to the expense that we have

already gone to, and then come back for further expense, and then have to go through this whole argument again. I am ready to rule, if you want to try the case, proceed now. If you don't want to try the case, acknowledge that my view of the law is correct, and that you are not going to appeal from that view and use that as the basis for an appeal.

Mr. Wiggenhorn: All right, your Honor, subject only to this: I might be able to change your mind when I get back.

The Court: Indeed, you may have full opportunity, and I will be glad to study it. I don't take any great pride in any view of the law that I have. As I have asked you now, if you had a case, I would be very happy to look at it, and I will be happy to look at any case in the meantime that you present me with, or any brief. I will be happy to have you present a brief on the matter.

Mr. Galles: Your Honor, it puts the government in rather a peculiar position in not knowing whether we should [92] come prepared for the total ownership theory of proof or of the divided ownership.

The Court: Well, in order to protect you, I'll give Mr. Wiggenhorn a week within which to submit a memorandum to me, and I'll notify you just as quickly as I can what my position is, if there is any change in it.

Mr. Wiggenhorn: That will be swell.

The Court: Very well, call the jury in.

(Jury returns to the Courtroom.)

The Court: Ladies and gentlemen of the jury,

you will recall yesterday afternoon I raised a point with the lawyers and asked them to look at some law. It appeared to me they had misconceived the law as it applied to this case, so upon an examination it does appear that happened, and as a result of that it is necessary for us to take a recess of some considerable time to permit the parties, both the government and the landowners to re-examine the facts and how to present them here in court. It is going to take some time, so as a result, we are going to have to recess the trial until a later date. I am not able to fix the date yet, but it will be some time in January when I am back up here finishing up other cases that have to be tried during this term of court, so this case will just be recessed. You will remain the jurors in the case, and we will pick the case back up at a later date, as I say, in January, when I am back up here [93] trying those cases that remain to be tried, so it is very important for you to pay attention to the admonition of the court in this long recess—it will be a recess of a month, actually, and you will remember, as jurors in the case, it is going to be important to keep in your mind the admonition of the court that you are not to discuss the case or any part of it or anything that has gone on here in court with reference to the case, just don't discuss it. If anyone asks you about it, tell him you are a juror and the Court told you under the law you are not to discuss it and let it go at that. Don't discuss it with each other or anyone else, nor permit anyone to talk to you about the case. Don't form or express any opinions in the matter. Stay away from that sort of

thing entirely, and as I say, you will be notified later and we will reassemble and continue on with the trial of the case in the light of the law as the court has found it to be, so you are excused now until Saturday morning at ten o'clock. We have another case that will start Saturday morning at 10:00 o'clock, so you are excused now until that time. Court will stand in recess until Saturday morning at 10 o'clock.

(Thereupon, the further trial of said cause was recessed until January 17, 1957, at 10:00 o'clock a.m., at which time the following proceedings were had:)

Mr. Galles: Ready, your Honor? [94]

The Court: Any other matters to take up with the court before we proceed with the trial of 1726?

Mr. Galles: No, your Honor.

The Court: Very well. Counsel, I would suggest that you haven't gotten very far the last time, but I think that you had better start right from the beginning if the jury is going to be in a position to follow the whole thing. In other words, as you members of the jury recall, we started this case sometime ago, but because counsel misconceived the case, we had to suspend the trial and give counsel time to prepare the case on the law as it exists, and so we will start the trial of the case now just as though we were starting it from scratch.

Mr. Wiggenhorn: Your Honor, I think as we spoke yesterday in your chambers, the United States

Attorney and myself, there were a few preliminary things to be straightened out on the record.

The Court: Yes.

Mr. Wiggenhorn: Do you want to do that in the presence of the jury now?

The Court: Yes, that is fine.

Mr. Galles: May it please the Court, it is stipulated between the government and the defendants in this action involving parcels 10 and 11, that parcel 11 may be consolidated in with that portion of parcel 10 which is owned by Clarence [95] A. Kolstad and Alta Kolstad in joint tenancy. That is the end of the stipulation.

The Court: Do you intend by that stipulation to indicate that the two parcels then become one unit?

Mr. Galles: We intend to indicate that the ownership stands in the same name, but that is as far as the stipulation goes.

The Court: Is that your understanding?

Mr. Wiggenhorn: That's right, the rest will be taken care of by evidence.

The Court: Very well.

Mr. Galles: Further, your Honor, C. A. Kolstad and Alta Kolstad were not named in the complaint as claiming an interest in parcel 11. As I understand it, the fact is that they are appearing here in court today to claim such interest. We are agreeing that the proof and this stipulation may amend the pleadings to that effect.

The Court: Very well.

Mr. Wiggenhorn: Now, then, your Honor, it was indicated that we are starting from the beginning.

I think it would be appropriate and proper to make at least a brief opening statement.

The Court: Yes, I think so.

Mr. Wiggernhorn: May it please the Court, ladies and gentlemen of the jury, some time has intervened since you [96] sat here before, some six weeks, and, no doubt, you have forgotten much of what transpired in the course of the trial of the case before. I am not going to burden you by going over, rehashing, with you what my associate told you in his opening statement other than to probably correct and straighten out what the court has indicated as counsel's misapprehension when we tried the case before. Now, this is the important thing for you to remember and that I should call to your attention: You were told by my associate when he made his opening statement before that we had here a job for you to do as jurors here to determine the just compensation that these defendants were to receive for their lands, and the impression was created before you that there was one—I think counsel so told you—that there was here one unit of land comprising about 17,000 acres, and it was from that unit the government took, as I remember it, about 9,000 acres, and you were going to be called upon to find out what the just compensation was to the defendants as a whole, the defendants being Clarence A. and Alta A. Kolstad, for the taking of this portion of their large tract. Now, it has been straightened out, and that is not the situation, and I am going to see if I can make that clear to you. You are now going to try, in effect, three separate cases, that is

to say, you are first going to be presented with the evidence of Clarence Kolstad's parcel of land, comprising approximately [97] 5,000 acres, and this is not any fiction, it is a fact, and it will be presented in the evidence as land of Clarence Kolstad and none other than Clarence Kolstad, and the evidence will disclose that a portion of this was taken, and what portion was taken by the Tiber dam, as you were told before.

Then, entirely separate from that, and as a distinct question for you to resolve as jurors in this case, you will be presented with evidence of some land belonging to Alta Kolstad independently of anybody else, her own land, Alta Kolstad, as I explained to you, being the wife of Clarence A. Kolstad, but wives in our state being individuals and just as responsible and entitled to own property as us, and she owns land, and the evidence will so show, and again it is in the neighborhood of 5,000 acres, roughly speaking, and of that a certain portion was taken by the Tiber dam and the reservoir made by that dam, and again, you will be asked in your deliberations to determine what the fair or just compensation is for her lands distinct and separate.

And finally, there will be presented to you another case, and this one is a parcel of land comprising about 7,500 acres which is owned jointly by Clarence A. Kolstad and Alta A. Kolstad. This parcel of land again is an entirely separate and distinct parcel of land, and again there was a portion of it taken by the dam and the reservoir, and you will be asked again to determine what the compensation

should [98] be for the taking of that lands, involving in each case the question of how much the balance of the lands remaining were damaged, if at all.

Now, the thing I want to impress upon you, and it probably may be confusing to you because we attempted and embarked upon a job of attempting to prove to you one ownership among the defendants in this case of 17,000 acres, you now have to dismiss that from your mind, and instead, consider each ownership and each parcel by itself as one problem for you to resolve, just as though we had John Smith and John Doe in here, separate defendants, each of them owning a parcel of land.

We will show, and our evidence will show, as probably was told you before in the opening statement, that each of these parcels of land is a large enough unit to comprise what witnesses will refer to as an economic unit, with a sufficiently large acreage of cultivated and tillable land within it to make a very substantial farming operation, wheat farming operation, and one that when disturbed and cut down in size, getting below a certain figure, reduces the remaining value per acre materially.

I think you will be shown as the evidence proceeds that actually, in each one of these cases, one more or less than the other, there were adverse results by reason of taking out the middle, the guts, so to speak, of the land. The [99] portion that was covered by water, or has been covered by water by this dam and lake or reservoir, so we find now, separates the parcels, and the evidence will disclose it to you, which requires that you couldn't farm it as a unit

because it is impossible to get across the lake, except with a sail boat or something similar. Other than that, I think I will leave it to the evidence to bring out the facts in the case. You were told before somewhat the nature of them, and the type of the witnesses we had here.

I think I should mention to you that aside from Clarence A. Kolstad, who will testify concerning value because he was the one that operated each one of these places, there will be brought before you two expert witnesses, and you will be able to judge for yourself their expertness and the types of witnesses they are. I think I can fairly say to you that they are witnesses who are completely objective, if you know what I mean by that, that is to say, they are witnesses who have had no local contact with the country, no occasion to puff it or do anything else but to be completely impartial appraisers, and they are men who have had a lifetime of experience in this type of a job, and that each one of them has a professional pride to bring out, regardless of the results, what the true value is according to expert standards, scientific standards, and I call it scientific because I think you will agree when you hear them that they are men who [100] use scientific methods for their appraisal methods, and when they come up with their values, as they will disclose them and demonstrate them to you, you will know that you are listening to men of authority, who speak with authority, and are not just here to try to testify in our favor or in favor of the defendants in this case, but merely trying to impartially and expertly, with

due respect for their profession, truly present to you what they believe to be—not just by pulling it out of the air, but by expert appraisal methods—the true value of these lands. I thank you very much.

The Court: Do you wish to reserve your statement?

Mr. Galles: Yes.

CLARENCE A. KOLSTAD

one of the defendants, recalled as a witness on behalf of defendants, having previously been sworn, testified as follows:

Direct Examination

By Mr. Wiggenghorn:

Q. Mr. Kolstad, when you testified here before—it has been suggested by the court that we start from the beginning, but I am going to try to make this just as brief as I can, and probably lead the witness a bit in order to save time here, you testified, as I remember, that you were 50 years of age [101] at this time? A. Yes.

Q. And you told us about your early history from your youth, as you, in your youth, in your early twenties, when you were a Deputy Sheriff in Liberty County? A. Yes.

Q. And how you gradually acquired land. And I think we had gotten to the point where you had told us somewhat of your experience in farming in this vicinity. the fact that you had been raised

(Testimony of Clarence A. Kolstad.)

from your boyhood on a farm, and your father was a farmer here before you, is that correct?

A. Yes.

Q. I am not trying to put words in your mouth, I am trying to save time. And I believe you also told us that you pretty well knew and had familiarity with the lands here in the vicinity of Chester where your lands are located? A. Yes, I did.

Q. Now, then, let us now confine ourselves, Mr. Kolstad, to the lands that you yourself own and have owned. It would aid the jury, Mr. Kolstad, if you showed them about the locations in these counties where these lands are. I suppose we should have this marked for identification.

Mr. Wiggenhorn: While we are waiting here, your Honor, I happen to notice this has been marked as Defendants' Exhibit 2. That reminds me that the map we used before is [102] marked "1." It is completely inappropriate at this time, I will suggest, and so ask that Exhibit 1 be withdrawn. It was never admitted.

The Court: In order to keep the record straight, we will have to keep all exhibits in order.

Mr. Wiggenhorn: That's right.

Q. Mr. Kolstad, I direct your attention to a map of Liberty County which has been identified and is marked as Defendants' Exhibit 2. Do you recognize it, and do you know your way about a map such as that? A. Yes, I do.

Q. Now, would you just give us the general location, and draw a rough circle about where your

(Testimony of Clarence A. Kolstad.)

ranch is located in Liberty County, and if it extends over into Toole County—I understand Toole County is to the west or left? A. Yes.

Q. You might point out a few landmarks in the meantime. What is that heavy line, broken line, across the middle there?

A. That is the Great Northern Railway.

Q. And can you point out Chester to me?

A. Right there (indicating).

Q. It is marked "Chester" on the map, is it not?

A. Yes.

Q. Now, if you will locate about where your ranch is [103] located? Just make a circle embracing it in general.

A. It is in the Marias River, and then went around and took in Willow Creek as part of it, the east border, and the north border, and turned there, along in there (indicating).

Q. Did it extend over into Toole County at all?

A. No.

Q. Now, wait a minute, will you write the words, "C. A. Kolstad" within that circle that you have marked?

(Witness does as requested.)

Q. About how many acres are embraced within this? A. About 5,200.

Q. You may take the seat. I didn't ask you where the Marias River was, but that is also shown on the map?

A. It is included in that circle.

(Testimony of Clarence A. Kolstad.)

Q. And is there also another creek or stream that we will be referring to in the testimony here?

A. Willow Creek, the one that runs in at the east end of it.

Q. That shows as coming from the north up there, and joining the Marias River on the map right on your place? A. Yes.

Q. Your lands then embraced bottoms in one or the other of those streams, Willow Creek or the Marias River? A. Both.

Q. Where about is the dam we referred to as the Tiber Dam? [104]

A. Oh, it is down about two or three miles. I forget what section that is, but I think it is right about here.

Q. You are pointing to a place there in what section, township and range?

A. Well, I don't know for sure. I think it is in Section 28 or 29.

Q. Township and range what?

A. Township 30 and Range 5.

Q. And when the dam was put in there and finally completed, it proceeded to serve to back up the water and form a reservoir as time went on?

A. Yes.

Q. When did that start, by the way?

A. In the fall of 1955.

Q. So that the land that is taken which is included within this reservoir, your land taken, follows along the Marias River and Willow Creek, is that right? A. Yes.

(Testimony of Clarence A. Kolstad.)

Q. This land you referred to now as yours is land that is in fact your own property, and you were the only one who had an interest in it?

A. Yes, I am.

Q. Clarence A. Kolstad land. I wish now, Mr. Kolstad, you would tell us what your knowledge is and your experience and acquaintance with the farm lands in the vicinity of your farm, and particularly, or more generally, we will put it, in [105] the neighborhood of Chester and around the neighborhood where your farm is located, what type of lands do you have there?

A. It is—in that area from the railroad track on south is an area covered by glacial drift, some 15 to 20 feet deep in places. There is no gravel outcroppings, and that is what makes the soil so highly productive. It is outstanding on soil maps. It shows the very area as far east as Cottonwood Creek—

Q. Where is Cottonwood Creek, would you locate it for us?

A. About 12 or 15 miles east of my place.

Q. It comes from the north, does it?

A. Yes.

Q. And runs south into Willow Creek, does it?

A. No, it is away east, it runs into the Marias River.

Q. It runs into the Marias River. Well, what kind of crops do they raise on this land in the vicinity you are describing to us?

A. We raise wheat mostly, some barley.

(Testimony of Clarence A. Kolstad.)

Q. What kind of wheat, particularly whether it is winter wheat or spring wheat?

A. We raise winter wheat mostly, sometimes we raise some spring.

Q. Is it land well adapted to the raising of winter wheat?

A. Yes, it is what we call the winter wheat area. It runs out when you get north of the railroad track and isn't nearly [106] as good.

Q. When you say it runs out, you mean it becomes land where you can't raise winter wheat?

A. No, winter wheat doesn't thrive on it like it does farther south.

Q. Well, is land that cannot raise winter wheat considered as valuable as land upon which you can raise winter wheat?

A. No, it isn't, because the production is less.

Q. Are there any other elements which enter into the consideration of value of land where you can only raise spring wheat? I am thinking particularly about the fact that this is arid country, generally so classed, and our rainfall is always a matter of uncertainty. What about spring wheat as compared with winter wheat?

A. Well, that is the reason winter wheat out-yields it. It ripens sooner and gets ahead of the hot weather and gets the most benefit of the June rains.

Q. So that if you don't get any moisture after the early spring, why, your spring wheat crop isn't going to do so well?

(Testimony of Clarence A. Kolstad.)

A. Well, it usually burns at the end where the winter wheat doesn't.

Q. The winter wheat ripens and is harvested sooner than the spring wheat?

A. Two to three weeks.

Q. Any things I have overlooked, not being a farmer myself, [107] where winter wheat has the advantage over spring wheat?

A. Certainly it does.

Q. I say, is there anything that you want to mention that I have overlooked calling your attention to?

A. Well, not only that it is higher in production, it gives you the advantage of getting in summer fallowing earlier. You seed it in the fall, and you don't have to seed wheat in the spring and you can summer fallow.

Q. Now, you mentioned something there that is probably pretty well known, but it should be testified to by you. In farming in this country, this arid country, you mentioned the words "summer fallowing." What is the accepted and proper way to farm for wheat?

A. Well, we just farm——

Q. I mean with reference to whether or not you crop it every year?

A. No, we crop it every other year, summer fallow one year half of the acres, and have half of the acres into crop.

Q. Where spring wheat is raised, is the same practice followed?

A. Yes.

(Testimony of Clarence A. Kolstad.)

Q. Again they alternate each year and let the land lie fallow for the intervening year, do they?

A. Yes.

Q. So that you don't get any more crops from spring wheat [108] than you do from winter wheat?

A. No.

Q. And what you have told us about this land generally, does that pertain to your own land that you have identified here?

A. Yes, it does.

Q. How does your land class with the surrounding lands thereabouts in value and in productivity?

A. Well, it is about the same as the land around it. There is no difference, no variation.

Q. Can you give us an idea of how level it is, how rough it is, and how it lies?

A. Well, it is level wheat land, of course. If it wasn't, it couldn't be farmed. I have some good pictures of that land that shows the topography of it.

Q. Before I have these marked, Mr. Kolstad, I want to be sure I have the right pictures.

A. Yes, those are the pictures.

Q. Tell me whether or not those are pictures of your own farm?

A. Yes.

Mr. Wiggenhorn: Mark these respectively.

Q. I hand you what has been marked as Defendants' Exhibit 3 and Defendants' Exhibit 4, and will ask you whether or not those are photographs of portions of your farm? [109]

A. Yes, they are.

(Testimony of Clarence A. Kolstad.)

Q. Let's start with Defendants' Exhibit 3. Where was that picture taken and when?

A. They were both taken at the same place, you can see where they join together. It covers the entire area across for about three or four miles.

Q. So that we may understand what you mean, I see that Exhibit 3 shows a road going along the right hand side of the picture. Is that road also shown on Exhibit 4 on the left hand side of the picture? A. Yes, the same road.

Q. What do these pictures respectively depict there with respect to your farm? What time of the year, you might tell us first, were they taken?

A. In the spring of the year.

Q. And was there any crop on the place where these pictures were taken, the land upon which these pictures were taken?

A. No, it shows the stubble from the year before, and it shows the summer fallow that was seeded.

Q. Now, let's identify this. On Exhibit 3, which you said is the one that shows the stubble from the crop taken off the year before? A. Yes.

Q. And Exhibit 4 shows what?

A. It shows both stubble and summer [110] fallow.

Q. None of it shows any growing crop?

A. Well, no, it was too early in the spring.

Q. Do they, however, reflect the general contour of the country?

A. Well, that is what it does, show you the topography of the area.

(Testimony of Clarence A. Kolstad.)

Q. Are they pretty typical of the lands on your—wheat lands, let us call it, on your tract?

A. Why, yes, you can see a couple thousand acres of it in these two pictures.

Mr. Wiggenhorn: Offer Defendant's Exhibits 3 and 4 in evidence.

Mr. Galles: We will object on the ground there is no proper foundation laid.

The Court: In what respect do you want further foundation?

Mr. Galles: The time, the year when these were taken as well as just at what point on his property, and looking in what direction they were taken.

Mr. Wiggenhorn: Well, I think that is fair criticism.

Q. I think you did tell us they were taken in the spring? A. In the spring of 1956.

Q. Now, let's see if you can locate for us on the map about where they were taken?

A. Right about there (indicating).

Q. You are pointing to a place—let's identify it if you can [111] by section?

A. The road runs between Sections 8 and 9, and we were right on the road and took the picture facing north.

Q. There is one thing material we should know, Mr. Kolstad. This land that you show us here in the picture, does that show some of the land that was taken, or does it show some of the land remaining to you? A. Both.

Q. Maybe you can explain which is taken and

(Testimony of Clarence A. Kolstad.)

where the taken part lies, and where the remainder lies.

A. Well, it was taken——

Q. You are pointing at 3 now, are you not?

A. All right. It was taken right up to where that hill goes down, it was taken from there on north.

Q. You are not referring to the picture being taken, but you are referring to the land being taken?

A. The land was taken.

Q. Taken up to what point on Exhibit 3?

A. Right up to that hill, right down to the bottom of that hill.

Q. Maybe you had better put a pencil mark there if it can be done, a cross, let us say.

(Witness does as requested.)

Q. Well, maybe we will try it another way. Is it all right for the witness to stand here while he is testifying? [112]

The Court: Yes.

Q. Now, as I understand——

Mr. Galles: I would prefer it if they were out of the view of the jury until they are received in evidence.

Mr. Wiggenhorn: You are quite right about that.

Q. If I understand you correctly, what you have been telling us here is that the foreground of this picture is a part of the land that was taken?

A. Yes.

Q. And you have been trying to make a line across toward the background of the picture showing that in the background the land still remains to you?

(Testimony of Clarence A. Kolstad.)

A. Yes. Right where we took the picture is out of the take.

Q. Now, I think counsel would probably like to know somewhat better what direction the camera was pointed when that picture was taken?

A. We were facing north.

Q. Were you present, by the way, when the picture was taken? A. Yes, I was.

Q. Who took the picture?

A. Mr. Kraut from Shelby.

Q. A professional photographer you employed for the purpose? A. Yes, I did. [113]

Q. You took him out there—— A. Yes.

Q. ——and told him where to take the picture?

A. Well, we decided between ourselves where to get a good picture. You can't take pictures every place to get a full background, so we took them wherever we both decided would make the best picture.

Q. Do I understand that you said the pictures, that you are looking toward the north in that picture? A. Yes.

Q. And the point you marked there on the map is probably not quite, doesn't mean too much to us unless we know how it is located with reference to either the Marias River or Willow Creek.

A. Well, it is between them. It is north of the Marias River, and you can see Willow Creek in the background of these pictures.

Q. And were the pictures taken on the bottoms of the Marias River or Willow Creek or up on the

(Testimony of Clarence A. Kolstad.)

bench? A. Up on the bench.

Mr. Wiggenhorn: That is about the best I can identify them. I will renew the offer.

Mr. Galles: I will object because it is remote in point of time. It is a year after the date of taking.

The Court: Overruled. Does the land depicted here, does [114] that indicate the condition of the land at or about the same time—what is the date of taking here?

Mr. Galles: May 24, 1955.

The Court: In May of 1955?

A. Yes. All I intended to do is show the topography, and it hasn't changed any, I don't think.

The Court: The objection is overruled, and the exhibits are admitted.

(Defendants' Exhibits 3 and 4, being the photographs above referred to, were here received in evidence.)

Mr. Wiggenhorn: May I pass them to the jury?

The Court: Yes.

Q. You spoke somewhat of the depth of the soil of this region, and your land particularly. Is that soil unusually deep as lands in Montana generally go?

A. Yes. It is true, though, on down through the Triangle.

Q. Now, you refer to the Triangle. Now, what is generally understood by the Triangle?

A. Why, it is the triangle made by the Great Northern Railroad. It has three corners bounded by Havre, Shelby and Great Falls.

(Testimony of Clarence A. Kolstad.)

Q. Those are the three corners comprising the Triangle? A. Yes.

Q. You take a line drawn from one town to the other, and we have the Triangle you refer to? [115]

Q. You are located about where in the Triangle?

A. Oh, in about the north central, or a little to the westly side of it. The top is on the north side.

Q. How many miles to the base of the top from your ranch? A. The base of the top?

Q. Well, we will consider it the base, anyway. I will accept your correction on it.

A. About 105 miles from Shelby to Havre.

Q. Well, I didn't mean that. I knew I wasn't using the right terminology. We have a triangle here standing on its point, so far as considering the north as the top, is that right?

A. That's right.

Q. Great Falls is the lower part, the lower point of the triangle? A. Yes.

Q. Then, the base is to the north, isn't it?

A. Yes.

Q. Now, how far are you from that line that forms the north base, we will call it?

A. Oh, about seven or eight miles.

Q. How does your land compare with other lands in the Triangle?

A. It is as good as any of it unless it would be down around the Dutton area. They have a little more wheat per [116] acre per year, but they don't raise as good a quality wheat, they don't raise as much protein.

(Testimony of Clarence A. Kolstad.)

Q. You didn't say anything about the quality of wheat you generally raise on your lands there. What about it? What particularly is the nature of the special value in that respect?

A. High protein. It is only raised in the State of Montana. In the whole United States, the State of Montana is the only one that produces high protein, and we are right in the heart of it.

Q. And with respect to Montana lands, this land of yours, is that still outstanding, do I understand?

A. Well, we raise, I think we raise more protein on the average than the higher producing areas, probably not any more than some of the lower producing spring wheat areas, but they lose out on production.

Q. And that extra protein, of course, commands a higher price? A. We get a premium for it.

Q. Give us some idea about how much premium you have been getting in recent years over the base price?

A. Well, I think right today the market is 47 cents for 17 protein.

Q. Well, now, 17 protein doesn't mean a thing to me unless you tell me what protein you get on your yields. [117]

A. Well, it averages 15, 16 protein.

Q. And do I understand—well, for 15 or 16 protein, what would today's market show, if you know?

Mr. Galles: I object to that as immaterial, today's market.

(Testimony of Clarence A. Kolstad.)

Q. Well, we don't need to be precise about it, let's say over the last few years. I want to know what added advantage high protein brings in the way of market price?

A. I would just say roughly between 25 and 35 cents on an average over the years.

Q. Over the base price? A. Yes.

Q. I don't think you have told us how land in the Triangle generally compares with other Montana wheat lands?

A. Well, I think it is the tops of the whole state in the way of production, and also in protein.

Q. Is that what you think, or is that generally so understood by reputation?

A. Yes, it is, according to the averages handed out by county allotment offices and so on, the figures you can get ahold of.

Q. Has anything transpired through the years with respect to this land in the Triangle as to its production and the capabilities in that respect, and as to its reputation and the value that has been attached to it? [118]

A. Well, yes, any land that is a high producing land always has a value. I don't know just what you——

Q. Well, I am talking of values. I want to know whether in the last years, in the last dozen years, let us say, roughly, it has been come to be understood generally that the value of this land has gone up or down in the Triangle?

A. It has gone up considerably.

(Testimony of Clarence A. Kolstad.)

Q. What has become apparent in the production from these lands in the Triangle?

A. Well, it has been consistent. We don't have a crop failure, we always raise wheat and we always have a good average every year.

Q. For how many years has that prevailed?

A. Well, for the last 15 years.

Q. I understand that this land of yours, as well as the other land in the Triangle is predominantly recognized as wheat land?

A. Yes, it is.

Q. And winter wheat land as you have told us?

A. Yes.

Q. Has the fact that you haven't had crop failures on this land in later years reflected itself in prices at which the lands have sold?

A. Well, lands haven't been selling much because they are just too good. People keep it. [119]

Q. Well, such sales as there have been, have they been at higher prices?

A. They are away up from what they used to be 15 or 20 years ago.

Q. Going back five years, have they gone up?

A. Oh, yes, a lot.

Q. And let's go back another five years, have they gone up over that five years, too?

A. They have been consistently going up since in the early thirties.

Q. You are referring now to the Triangle area?

A. Yes, I am.

Q. Including your own lands?

A. Yes, I am.

(Testimony of Clarence A. Kolstad.)

Q. About what has been your average production per acre of seeded land on your ranch over the last 10 years, let us say?

A. Well, I wouldn't go back quite 10 years because I haven't enough records, but I would say in the last seven or eight years, I have averaged 22 bushels on seeded acres.

Q. Now, you said over the last seven or eight years, and that is based upon—you mentioned the word "records," is that actually based upon records that you have kept? A. Yes.

Q. And when you speak of records, what records are you [120] referring to?

A. My farm records that I keep for income tax purposes showing the sales, and, of course, the record of the seeded acres can be gotten out of the allotment office.

Q. Now, this average of 22 bushels per acre, and that is seeded acres—— A. Yes.

Q. Does that take into account lean years when production wasn't so good and fat years?

A. It is an average of the years.

Q. And to be fair about it then, so that the jury will understand it, that 22 bushels per acre average, would mean that one-half of that amount, or 11 bushels per cultivated acre would be the average, is that right? A. That's right.

Q. Now, have modern farming methods had anything to do with the consistency with which you have been able to raise crops on your farm, and elsewhere in this vicinity?

(Testimony of Clarence A. Kolstad.)

A. Well, certainly, and it has also helped to build up our averages because we can get the work done on time. All our summer fallow is always good whereas it used to be we didn't have enough power to get the job done on time.

Q. And what, in your opinion from your expertness and knowledge of farming, is it that is the secret of that success in wheat farming on arid land for winter wheat with the land or half of it lying fallow each alternate year? [121]

A. Well, the secret is the size of the place, if it is large enough to operate efficiently, why, you make more net profit from it.

Q. And what type of outfit do you find from experience is needed as to size and power and so on for operating such a place successfully?

A. Diesel crawlers.

Mr. Galles: I will object to that as immaterial.

The Court: Overruled.

A. We use Diesel crawlers for the most efficient operation.

Q. Give us an idea of what size unit that would be that you recommend and use?

A. Well, you would buy your crawler to fit your size of unit; you would want your horsepower to fit the size of the acreage.

Q. With respect to an economic unit—you referred to sufficient size. What size unit, I might ask you, would you consider a minimum to efficiently operate?

A. Not less than 2,500 acres, 3,000.

(Testimony of Clarence A. Kolstad.)

Q. You mean 2,500 acres of cultivated land?

A. Cultivated land.

Q. And then again will you tell me what 2,500 acres would be, about four sections of land?

A. Something like that.

Q. And as I understand it, that doesn't just mean the entire [122] acreage that one would own, but it is cultivated acres out of that?

A. That's right.

Q. And then what kind of an outfit should properly be used, that is, Diesel crawler that you talked about, how big should it be?

A. Oh, probably about an 80-horse crawler.

Q. In other words, it has got to be a big, powerful outfit?

A. Certainly.

Q. What type of plows and other—cultivators and so on, what size—I am afraid I don't know your technical term. What do you call it? What width of outfit do you pull behind that in the way of cultivators and plows and so on?

A. That would depend upon what you were doing; there is duck foots or rod weeders.

Q. Well, maybe I am rambling away a bit, Mr. Kolstad. I am trying to find out from you—maybe you can tell us in your own words. In the most efficient farming methods to yield the highest profits from such a unit as you have described, what is required in the way of getting the work done with promptness?

Mr. Galles: Object to that as being immaterial. The profits are not an issue in this case. I am going

(Testimony of Clarence A. Kolstad.)

to attempt to keep the testimony confined to land values.

Mr. Wiggernhorn: I am quite agreed with counsel, but I [123] think it is quite material, your Honor, along the lines I was just pursuing here to try to demonstrate that these lands have increased in value because of these discoveries.

The Court: For that purpose, you may proceed.

Q. Do you have the question in mind?

A. No, I lost it.

Mr. Wiggernhorn: I have lost it, too. I wonder if you would read it, Mr. Reporter.

(Question read back by Reporter.)

Q. How do you go about it, teach me how to farm that kind of unit, if you will, please.

A. Well, it depends upon your unit. You have to fit the equipment, the size of your equipment to the size of your unit. It can be from 2,500 on up to 5,000 acres, any amount of acres, but it has to be at least 2,500 in my estimation to be an economic unit, or an efficient economic unit.

Q. Go ahead.

A. And if you are going to—if it is a one-man operation—by that I mean if it is a one-power unit operation, one Diesel will handle any amount of it up to four or five thousand acres, if you get a big enough Diesel, but you should fit the acreage with the right size Diesel, in order to be efficient, and, of course, when you get your power unit, you will

(Testimony of Clarence A. Kolstad.)

fit the rest of your equipment to it, whatever it will pull. [124]

Q. Well, what I am driving at, Mr. Kolstad, I want to find out what the secret is of recent years that has made it apparent that these lands in your district there, your lands included, have reached a higher value. What is the secret of farming that has brought that about, if there is one?

A. It is power farming.

Q. Which, as I understand it, means and entails and necessarily requires that there be less manpower and more machine power used?

A. That is what it amounts to, that is where the savings comes.

Q. And does that power farming, as you call it, also bear upon the time element that is important, is it, in farming this type of an operation to get your various jobs done quickly in summer fallowing and working the ground?

A. That is the secret of the whole thing, to get it done on time.

Q. Have you, yourself, in farming—I'll withdraw that. Now, over the years in the past, we will say prior to 15 or 20 years ago, do I understand in this same Triangle country there have been crop failures when the landowners have actually lost, when they haven't even made their seed, so to speak?

A. That has been a long time ago. [125]

Q. How about recent years, has it always been profitable in the last 10 or 15 years?

(Testimony of Clarence A. Kolstad.)

A. Certainly it has.

Q. Has that been due entirely to nature and rainfall, or is it due to the methods you have been telling us about?

A. It has been due to modern farming, modern practices because the rainfall hasn't varied very much over the last, I guess, 20 or 30 years.

Q. So I understand from you, then, that modern farming methods, that with them, power farming and so on, the risk has pretty much been taken out of farming in this district that you are talking about?

A. Well, if history means anything, it has certainly been taken out.

Q. How is that?

A. If history means anything, we have taken it out.

Q. And that, of course, refers to winter wheat. There is always some risk in spring wheat, is there?

A. There is more risk than there is in winter wheat.

Mr. Wiggenhorn: I was going to embark on questions of value, and I am wondering if you are planning on a recess this morning?

The Court: Yes, do you think this is the proper time?

Mr. Wiggenhorn: It might be.

(Jury admonished—10 minute recess.) [126]

Q. Mr. Kolstad, from your knowledge, and your long life span lived in this vicinity where your

(Testimony of Clarence A. Kolstad.)

ranch is located, do you profess to know the fair market value of the lands in that vicinity at the time of the taking on May 24, 1955?

A. Yes, I do.

Q. And as a long-time resident here, have you been familiar with such sales as have taken place in the vicinity?

A. Yes, I am familiar with most of them, I think.

Q. Do you think you have knowledge, then, as well as anybody does?

A. Well, yes, I have been interested in following them.

Q. You have been interested in following them and have kept your ear to the ground?

A. Yes, I have.

Q. At how high a price have any lands sold at?

A. \$135 to—I think around \$135, right in there close.

Q. When we speak of that price, are you referring to the price for cultivated land?

A. Oh, yes, that is for wheat land.

Q. That wouldn't be across the board?

A. No.

Q. Now, from your own knowledge of such sales as have taken place, from your knowledge of what lands of this sort produce, and the reasonable expectations the owner can have of profits, and from all your experience, what is your opinion, as [127] well as by way of being owner of this land, what is your opinion or your estimate of the fair market

(Testimony of Clarence A. Kolstad.)

value of the lands that were taken by the government in this case on May 24, 1955?

Mr. Galles: Object to that as improper, your Honor. It is not the test, the value of the lands taken, under the before and after rule.

The Court: Sustained.

Mr. Wiggenhorn: I was not paying too much attention. May I inquire——

The Court: The question is what was the fair market value of the lands before the taking, and what was the fair market value of the lands after the taking.

Mr. Wiggenhorn: I realize that now. I did ask the wrong question. I will withdraw the question.

Q. Instead of that, Mr. Kolstad, I will ask you what is the fair market value of your entire farm, which I think you said comprised about 5,200 acres, with relation to the same concept that I have mentioned in my other question?

A. I forget just what I had.

Q. Well, do you have some notes in your pocket?

A. Yes, I have, because I broke it down.

Q. Before we break it down—we will do that momentarily—I want to have you give us first the value of the entire unit.

A. The value of the entire unit is around [128] \$452,000.

Q. That was at the time, or immediately before the time of taking? A. In 1955.

Q. And I think you told us there were approxi-

(Testimony of Clarence A. Kolstad.)

mately 5,200 acres. Do you have there on your memorandum the exact acreage?

A. 5,180 acres, point seven.

Q. 5,180.7 acres. Now, I direct your attention to the exhibit now on the board before the jury marked defendant's Exhibit No. 5, and I will ask you generally what it pretends to depict?

A. That is the entire acreage, the 5,180 acres.

Q. Embraced in various colors?

A. Well, that is according to classifications.

Q. Now, have you classified your lands?

A. Yes, I have.

Q. And will you identify the colors that you have marked them here on this exhibit as to what they represent in the way of classification?

Mr. Galles: I'll object to testimony with reference to the exhibit until proper foundation is laid.

Q. Will you tell us how this exhibit was made up, and from what information it was made up?

A. I classified the land by going over it, measuring it, and then I used girls in the allotment office with a planimeter on aerial photographs to measure various land as to [129] agricultural and grazing and so on. Then, from those maps that I colored out, I had this map made, transcribed from it into an overlay map.

Q. And the classifications that you have used, were they tillable, bottom land, grazing land, plowed land, and breaking, as they have been identified here?

A. Yes.

(Testimony of Clarence A. Kolstad.)

Q. And by breaking, you mean land that has been broken, but not yet cropped?

A. That was made in 1955, and at that time, it was new ground. It has been cropped now since then.

Q. Since the time of taking?

A. Part of it.

Q. You are trying to represent here the land as it existed at the time of taking, duly classified?

A. In 1955, yes.

Q. In these classifications that you made, they were based upon careful study on your part, and from your familiarity with the ground?

A. I have been over every bit of it.

Q. And you say you also consulted the soil conservation office and the allotment office?

A. It was made from my own study, and then verified by the aerial maps in the Assessor's office.

Q. And the exhibit as we find it here now, then, is as you [130] prepared it, only it was put on this form, but otherwise, it is exactly as you yourself prepared it.

A. Yes.

Mr. Wiggenhorn: Do you want to renew any further objection?

Mr. Galles: I wonder if I might inquire of the witness who made what is marked as Exhibit 5, Mr. Kolstad?

A. I had it made in Portland.

Mr. Galles: You didn't make it yourself?

A. No.

Mr. Galles: Have you looked at it and know it is

(Testimony of Clarence A. Kolstad.)

accurate as far as the description of the land owned by you is concerned?

A. I have checked it back against my own map that he used to make this with.

Mr. Galles: And what about the cross-hatching on the map, what is that?

A. That is the lake.

Mr. Galles: Is that the lake as it exists now?

A. Well, that's too rough to be accurate. We kind of roughed it in to get an idea, but it is on the, oh, probably on the 2980 line, I guess, or——

Mr. Galles: 2980 is the elevation mark?

A. Yes, either 2980 or 2992, I forget which we used, but it really doesn't make any difference. All we were trying to [131] do is show that the water was in between this land. As far as the accuracy of the water line, I won't back that up.

Mr. Galles: You are not representing the accuracy of that?

A. No, because the water won't be on anything that isn't taken, and it will be on everything that is taken, so that is all we cared about on that.

Mr. Galles: Well, it won't be on everything that is taken, you didn't mean that?

A. No. I mean by that there won't be any water showing on what hasn't been taken.

Mr. Galles: I think that is satisfactory.

Q. (By Mr. Wiggernhorn): It is safe to say this, then, that with reference to your own lands, the lake as depicted there, or reservoir as depicted there, is correct with reference to your land?

(Testimony of Clarence A. Kolstad.)

A. That's right.

Q. Well, now, then, will you proceed to identify on the map, on the Exhibit 5, the various classifications that you have thus broken this land into, your lands into, starting with the first one, the red? I think you will find the legend on the map which helps to identify it. There is a pointer here, by the way, if you prefer to use it.

A. Well, the first one—do you want to call it red today? You called it purple yesterday. [132]

Q. It looks red to me today.

A. Anyway, the first one is tillable.

Q. That is red?

A. All right, we will call it red today. You will find it in all the various places where it is. The next one is bottom land——

Q. That is blue?

A. The blue one is bottom land. It is only along the river and a little bit along the creek. Then, the green one is grazing, which is shown in the various places where it is. The plowed land is in the black, and that is the land that was in the pictures that you saw. The pictures were taken along right about here (indicating) and showed this land all the way in through here (indicating). And then the breaking, that is in the yellow, and most of it is under water now, but some of it was cropped in '56.

Q. Now, the only difference, as I understand you, between what has been identified there in the yellow as breaking and what is identified in the

(Testimony of Clarence A. Kolstad.)

black is plowed land, is that the yellow is also broken land, is also plowed land, is it not?

A. Yes, it's the same kind of land, only it was new land. Back here when this map was first made was in '55, and I wanted to segregate it from the other, mostly for my own benefit so I would know which was which. [133]

Q. In other words, that yellow, while broken the same as the black, it had not, at that time, in 1955, in May, 1955, yet been cropped? No crop had been taken off of it?

A. No, it was in summer fallow. It really had been broken in '54 and was in summer fallow in '55.

Q. Otherwise, it classes the same as the black?

The Court: Pardon me, may I ask a question. You have referred to red on the map. There seems to be different shades of that color. Do you refer to them all as red?

Mr. Wiggenhorn: I'll answer, if I may. I will refer to them all as red, yes. There is not supposed to be any distinction. Is that right, Mr. Kolstad?

A. That's right, yes. I think maybe the way the light hits there is the reason.

Mr. Wiggenhorn: Yes. Some of them are almost pink.

The Court: Well, yes, but all of these, this and this (indicating) are the same color, are they, you refer to them all as red?

A. Yes.

The Court: Very well.

(Testimony of Clarence A. Kolstad.)

Q. (By Mr. Wiggenhorn): Now, does that map likewise show the Marias River?

A. Yes, it is described on there.

Q. And does it show Willow Creek?

A. That is Willow Creek going up here. [134]

Q. You are pointing to it?

A. Well, this is the line (indicating) that is supposed to be the bottom.

Q. Your ranch, then, lies upon both Willow Creek and the Marias River, or did lie upon both Willow Creek and the Marias River? A. Yes.

Q. And the crosshatching, as counsel has mentioned, represents approximately about the area of the reservoir, at least when it is finally filled?

A. Yes, at a certain level. That is roughly the size of the lake.

Q. All right. You may resume the stand.

A. All right.

Mr. Wiggenhorn: Now, for assisting the witness in his breaking down these classifications and identifying acreages, will you mark this for identification? You have a copy of this, counsel?

Mr. Galles: Your Honor, if we might have a few minutes. I have objected to one portion of the form of the exhibit that counsel is marking.

The Court: Very well.

Q. I hand you what has been marked for identification as Defendants' Exhibit 6. Is that a tabulation which we refer to in a moment in your testimony of the breakdown or classification [135] with respect to acreages and values that you are about to

(Testimony of Clarence A. Kolstad.)

testify concerning here? A. Yes, it is.

Q. Well, referring to that exhibit, then, it shows at the top that the total acreage in your entire lands before the taking was 5,180.7 acres, as you have testified to a moment ago, is that true?

A. Yes.

Q. And now, then, there follows the breakdown of that acreage of the land that you owned before the taking, and will you tell us, now, then, how many acres of plowed ground there were at that time, as you classed them?

A. 2,551.30 acres of plowed ground.

Q. How many acres of tillable ground?

A. 834.20.

Q. Now, let's go back a moment to this plowed ground. That included then both the black and the yellow as shown on Defendants' Exhibit 5?

A. Yes.

Q. And your next classification is the grazing land. How many acres of grazing land were there at that time in your lands? A. 1,191.69.

Q. And how many acres of bottom land?

A. 603.41. [136]

Q. We might inquire about this bottom land. What was the character generally of that bottom land?

A. It was open river bottom, but it was undeveloped except that we used some of it to cut wild hay on.

Q. What was it suitable for, its highest and best use, put it that way?

(Testimony of Clarence A. Kolstad.)

A. What we didn't cut hay on was ideal for winter grazing.

Q. Whatever you may have used it for is probably not so important. What would it be suitable for?

A. Well, the largest part of it could have been developed into alfalfa meadows.

Q. Was it also suitable for feeding cattle in the winter time or running cattle in the winter time?

A. Oh, yes, yes.

Q. The grazing land, give us an idea of how good or bad it was, that which you classified as grazing land on your place?

A. Well, it was average grazing that you find along the Marias River. Some of it was breaks, and some of it was in the lower land, some of it was up on top on the bench.

Q. Now, then, getting back again to the plowed land that includes both the cultivated and the yellow there, the plowed or breaking, what value do you put upon it as of the time of taking per acre?

A. \$125 an acre. [137]

Q. And you have carried that out, have you, by multiplication in Exhibit 6 which you have before you into what figure? A. Into \$318,922.50.

Q. And then your 834 and a fraction acres of tillable land, what value did you put on that at the time of taking? A. \$95.

Q. And that amounted to how much?

A. \$79,249.

(Testimony of Clarence A. Kolstad.)

Q. Then, the grazing land, 1,191 and a fraction acres, what value did you put on that?

A. \$20. That made it \$23,833.80.

Q. And the bottom land, 603 acres, what did you value that at? A. \$50. That is \$30,171.50.

Q. Comparing that with the \$20 value you put on the grazing land, you figured, then, that those bottoms, with the possible uses of it, and the actual use you put it to yourself, justified that much higher value, did you?

A. Why, yes, it is conservative.

Q. Was there water there for the irrigation of those bottoms had you seen fit to do it?

A. Yes, the Marias River ran right through them.

Q. And how about Willow Creek where you find bottoms along Willow Creek?

A. It had water in it for the first half of the year, [138] usually until around the 4th of July.

Q. Any sub-irrigation there in those bottoms?

A. Yes.

Q. You mentioned something about cutting wild hay sometime?

A. Well, it is partly sub-irrigation, and if the rainfall came at the right time, it would make good hay.

Q. Now, the total of all of those figures you have given us there and that is shown upon this exhibit is how much? A. \$452,176.80.

Q. And when you testified here a moment ago to a value of \$450,000 as your opinion of the fair

(Testimony of Clarence A. Kolstad.)

market value of your land before the taking, you just made that a rough figure and dropped the extra \$2,100, did you? A. Yes.

Q. And did you also figure out what the price per acre would be for the total of \$5,180 acres you then had before the taking, across the board?

A. Yes, I worked it out. It would amount to \$87 per acre.

Q. Well, now, then, let's take a look at the land after the taking. This Exhibit 5 that we have here on the board, as you have told us, is the way your land looked, classified as you have classified it, before the taking? A. Yes.

Q. And I will pull off this first transparency, and will ask you what is now shown on the same exhibit with respect [139] to the colored portion of it? A. That's what's left.

Q. So that when I slipped off this first transparency here, or overlay, I was just taking off, was I not, the land that was in fact taken?

A. That's right.

Q. And if you put it back on here again, and hold it off, why, this first overlay on the exhibit represents the land that was actually taken?

A. Yes, it does.

Q. So, when we take it in the manner in which I am doing it right now, we have left the land that remained to you after the taking? A. Yes.

Q. And you can see here, can you not, by the crosshatching, how the lake or reservoir lies with respect to those lands taken? A. Yes.

(Testimony of Clarence A. Kolstad.)

Q. And before we go into the value of the remaining land after taking, will you point out any significant things to the jury about the parcels of land that are there left, with respect to the reservoir, particularly?

A. Well, I am out of the farming business.

Q. Do you mean that literally or figuratively?

A. This is all I got left, this part is cut away, this is [140] all water, all of this part is water (indicating).

Q. The crosshatching?

A. Yes, so that this part is left over here (indicating)——

Q. Now, wait a minute, when you say “this part,” you are pointing to what?

A. This 80 acres.

Q. Those are 80 acres of what?

A. Tillable land, mostly tillable land.

Q. Let's take a look at those 80 acres for a moment. How would it be possible for you to farm those 80 acres in conjunction with what remains to the north of the lake or reservoir?

A. It would be possible by traveling about 50 miles.

Q. And why do you say that?

A. That is the only way to get there.

Q. That is to say the lake now stands between your 80 acres and the remainder of the land?

A. That's right.

Q. And you have to go around by road to get on there?

(Testimony of Clarence A. Kolstad.)

A. That's right, you have to go to the dam, cross it and then come around to Highway No. 2 and come down again.

Q. Will you tell us whether or not the 80 acres could be farmed in conjunction with the balance, or whether it now becomes a separate unit, or a separate 80 acres?

A. Well, it couldn't be farmed. That would be ridiculous to [141] drive 50 miles to farm 80 acres.

Q. As a matter of fact, is it feasible or possible or economical as the matter now stands, as you find yourself with respect to that 80 acres, to farm it at all? A. No.

Q. What remains, what value is in it?

A. All the value it has is what you might be able to sell it to somebody else for.

Q. And a small unit of that sort, 80 acres, can that be farmed by an individual unless he joined it up with other lands he has to make an economic unit?

A. It would have to be somebody that would have land adjoining it that would buy it.

Q. Well, now, let's take a look at the land that lies north of the reservoir. What have you to say about that as to whether or not there is sufficient land there, cultivated land or tillable, to make up an economic unit?

A. It is not an economic unit.

Q. What? A. It is not an economic unit.

Q. Now, will you refer again to your Exhibit 6, I believe it is. Does that also show the breakdown

(Testimony of Clarence A. Kolstad.)

of the classification of the lands remaining that are now shown on Exhibit 5 that you have just testified to? A. Yes, it does. [142]

Q. How many acres of plowed ground?

A. There is 807.5 acres left.

Q. And how many acres of tillable?

A. 379.80.

Q. Let's pause there for a moment. That makes for the two of them 1,180 some acres?

A. 1,187.30.

Q. In your opinion, is that an economic unit that could be farmed successfully? A. No, it isn't.

Q. Does the value of that smaller unit as small as this one is deteriorate or go down then from the value you have placed of \$125 for your plowed ground before the taking?

A. Yes, it does, in my way of thinking.

Q. Well, all right, what value did you put on that 807 and a half acres of plowed ground after the taking, considering the amount that was left to you there? A. A value of \$100 per acre.

Q. And did you cut that value down from the \$125 you had before the taking because it was a smaller unit, or was there anything else involved in it?

A. Well, because it was a smaller unit, it ceased to be an economic unit.

Q. Did you also take into consideration that 80 acres of it was south of the lake, and not available to you for farming? [143]

A. You are not on tillable ground now.

(Testimony of Clarence A. Kolstad.)

Q. That's right, that's tillable, that is not in the plowed classification, is that right? A. Yes.

Q. Well, then, let's take a look at the tillable then. You had that valued at \$95 before the take, what is your value then after the take?

A. \$80.

Q. You dropped it \$15 an acre, did you?

A. Yes.

Q. What entered into your calculations in making that drop?

A. Well, there isn't enough of it left, and then that 80 acres across the river had no value at all in reality, only what you could get for it.

Q. So, then, you have got a differential of \$25 of the value of your large unit as you originally had it for plowed ground, you have got a difference of \$25 an acre in the value of that before the take and after the take? A. Yes.

Q. And with respect to the tillable, you again have dropped down only \$15 from the value before the take and the value after taking, right?

A. That's right.

Q. Now, let's take a look at the grazing land.

What did [144] you value that grazing land at before the taking, \$20 an acre? A. \$20 an acre.

Q. And after the taking, what did you value it at? A. \$5.

Q. How many acres did you have left?

A. 212 acres point 70.

Q. That is shown in the green on that map, and we see just where it is located, do we not?

(Testimony of Clarence A. Kolstad.)

A. Yes.

Q. Various patches. And will you tell us as a farmer and a man who knows about stock raising, tell us whether or not those small patches of grazing land have any appreciable value left?

A. No, they are not large enough to operate cattle on.

Q. So that you feel that the \$5 value would be right, or would it be a fair value to put on it?

A. It is the fair value. All those are for is just to tie your land together. It is not any good any more.

Q. One thing else about this grazing, can you get to water with your stock if stock were to be run on that grazing land, could they reach water?

A. No.

Q. They could before, could they not?

A. Yes, they had the Marias River. [145]

Q. You didn't tell us before, but without putting that overlay back on there, was your grazing land readily available to water?

A. Yes, the river was running, and the creek had water in it at all times.

Q. It was ideal for cattle so they could reach water at any time?

A. On both sides.

Q. And that condition no longer exists?

A. No, it doesn't.

Q. You are now completely shut off from water on your grazing?

A. That's right.

Q. And what about the bottom lands, you lost all of that?

A. I lost all of that.

(Testimony of Clarence A. Kolstad.)

Q. You had that valued at \$50, and, of course, you haven't any left? A. That's right.

Q. And with respect to the ranch as a whole, was that bottom land, from the standpoint of an interested buyer, in connection with the farming and the highest and best use available, would that bottom land in itself be attractive and a feature that would enhance the value of your entire ranch?

A. Why, certainly. You have to have water in order to have a cattle ranch. [146]

Q. And likewise, did these bottoms afford shelter for cattle?

A. Some of them had trees on and brush, and some of them were plain.

Q. Could you raise alfalfa on the bottoms also, was it possible to?

A. A lot of them were already level, and it could be completed.

Q. That is all gone now?

A. It is under the water.

Q. The pieces of land that you have left that are shown there on the exhibit before the jury now, it is just what you have left, and you have got no bottoms, and you have just those pieces of land?

A. That is all.

Q. And just as a matter of interest, Mr. Kolstad, you had 5,180 acres before the taking. How many acres do you have left after the taking?

A. 1,400.

Q. That included everything, did it?

A. Yes, that is all the acres that are on that map.

(Testimony of Clarence A. Kolstad.)

Q. And the value that you have placed upon it as you have broken it down into classifications amounts to how much per acre value there?

A. Across the board? [147]

Q. Yes. A. \$80.

Q. Now, as I remember your testimony, you testified a moment ago that the price you put on the land before the take, all those classifications added together amounted to \$87 per acre, and after the take, the 1,400 acres, the price that you put on it amounts to \$80? A. That's right.

Q. You dropped \$7 an acre as the net result of your valuations, is that correct? A. That is it.

Q. Probably I neglected one thing, Mr. Kolstad. In referring to the 1,400 acres after the take, you gave us the various numbers of acres in each instance of the three classifications remaining, plowed, tillable and grazing. Carrying out the value of \$100 an acre for the 807 and a fraction acres, how much does that amount to? A. \$80,750.

Q. And 307.80 acres at \$80 amounts to how much? A. \$30,384.

Q. And the 212.70 acres of grazing at \$5 amounts to how much? A. \$1,063.50.

Q. And the total amounts to how much?

A. \$112,197.50. [148]

Q. And I believe when you testified a moment ago, you valued the 1,400 acres at an even \$112,000?

A. Yes.

Q. As against the value you put on it before the taking of \$452,000? A. Yes.

(Testimony of Clarence A. Kolstad.)

Q. And does Exhibit 6 also show the difference between the \$452,000 before the taking, and the value after the taking of \$112,197, does it show the difference there? A. Yes; \$339,979.30.

Q. Now, then, is that the amount you claim you were damaged in this case and that your loss that you have suffered amounts to? A. Yes.

Q. The difference between the two figures?

A. That is it.

Q. The difference between the value before the taking and the value of the land remaining after the taking? A. Yes.

Q. I believe by the process of subtracting, we would find that deducting 1,400 acres from 5,180.7 acres, we would find out the amount of land taken. That would be 3,780 acres, wouldn't it, approximately? A. Yes.

Q. Did you also figure out, then, on the basis of the difference [149] in value before the take and after the take, how much that 3,780 acres would amount to per acre across the board?

A. It amounts to \$87 per acre across the board, making a total of \$327,860.

Mr. Wiggenhorn: We now offer in evidence Plaintiff's, or Defendants' Exhibit 5. That is the map.

Mr. Galles: Pardon.

Mr. Wiggenhorn: Defendants' Exhibit 5, I think, is the map.

Mr. Galles: I would like to have an opportunity to check the accuracy of the land as colored with

(Testimony of Clarence A. Kolstad.)

my information before determining whether I have an objection to it or not on that basis.

The Court: Well, what difference would that make whether you agree with it or not?

Mr. Wiggenhorn: It might make a difference in his objection.

The Court: That is, if he has laid the foundation for its admission, it is admitted whether you can show it is inaccurate or not.

Mr. Galles: Very well; I will withdraw my objection.

The Court: Very well; it is admitted.

(Defendants' Exhibit 5, being the map above referred to, was here received in evidence.) [150]

Mr. Wiggenhorn: We likewise offer Defendants' Exhibit 6. You have a copy of this, counsel?

Mr. Galles: Yes. Your Honor, in pretrial, we agreed that there should be a summary of values for each expert, and on that basis, I will agree it may be received.

The Court: Very well; it is admitted.

(Defendants' Exhibit 6, being the summary above referred to, was here received in evidence.)

Mr. Wiggenhorn: I think I neglected also to offer in evidence the map which was Defendants' Exhibit 2. I have even lost track of it.

The Court: That is the map of Liberty County?

Mr. Galles: No objection.

(Testimony of Clarence A. Kolstad.)

The Court: Very well; it is admitted.

(Defendants' Exhibit 2, being the map above referred to, was here received in evidence.)

Q. Have you kept some records, Mr. Kolstad, over the past half dozen years of your costs of operation? A. Yes.

Q. And those records have likewise been reflected in your income tax returns, and you have them available, do you? A. Yes.

Q. Tell us about how much it has cost you over the last half a dozen years per acre for your farming operation, your wheat farming operation, having in mind every element entering [151] into cost such as depreciation, taxes, and everything else that could properly be charged to cost?

Mr. Galles: I will object to that question unless it can be shown his records are confined to the land involved in his particular ownership.

The Court: Yes; I think you have to lay a foundation for the records on this properly.

Mr. Wiggenhorn: I wasn't going to offer the records themselves unless counsel wanted to see them. I merely proposed to have the witness testify to what the general cost of operating these lands of his has been.

The Court: You will have to show you are asking him to do that from records. You will have to establish he has records covering these lands.

Mr. Wiggenhorn: Does your Honor mean that

(Testimony of Clarence A. Kolstad.)

the records would be the best evidence, that he can't testify orally? I was going to have him testify orally, to tell the truth, because I understood the question was raised before in another trial.

The Court: I'll discuss it with you out of the presence of the jury.

(Jury admonished.)

(Jury withdraws from Courtroom.)

Mr. Galles: Your Honor, I understand just from conversation with counsel that their records are based upon the production not only of the lands this witness testified to, but [152] lands owned by Mrs. Kolstad and lands owned by them jointly, and possibly other lands. Unless they can lay the foundation that the records are confined to the operation of this land and not the operation of other land, I think we must object to it as being immaterial. It gets into the basis of the appraisal of the operation rather than the land.

The Court: That is as I understand the situation.

Mr. Wiggenhorn. You couldn't possibly pick out of the records the exact cost of operating this land. We know it to be true and counsel knows it, and the court is aware of it, too, that the witness not only farmed this land, but likewise farmed two other tracts. Of course, the records are elaborate, they show the operation of the whole. My proposal is this: That we are trying to establish what it costs

(Testimony of Clarence A. Kolstad.)

to produce a bushel of wheat, to farm an acre of ground, how much it costs per acre. It doesn't matter whether it is this precise land or whether it is land of a similar character. To be very honest and frank, my hope is that the witness might show what his cost of operation had been farming this type of land, let's call it that. I am willing to confess that counsel is quite right in this respect: When you have a larger operation, when you are farming three times as much land as this particular farm, he might be able to reduce the cost. We have been contending that is true, he might be able to reduce the costs somewhat. I would be [153] willing to confess that having testified what that cost was, he should be required to tell us those costs should be extended over more lands than these.

The Court: He has already said the larger the unit is, the cheaper it is to operate, so what does it prove? Are you then going to tell the jury after you introduce evidence of the cost, "Don't pay any attention to these figures I gave you because they cover a larger unit and I haven't had any experience just operating this smaller unit"?

Mr. Wiggernhorn: I am not going to argue about it to that extent, only it did seem to me, my point of view is this: While it is true we can't give the accurate figures of what it cost to farm this 5,100 acres, we can show generally what it costs on a larger operation. Confessedly then, in view of that fact, the witness confesses and acknowledges that it would cost a little more on this operation.

(Testimony of Clarence A. Kolstad.)

The Court: Let me tell you what you have done. You have asked the witness before the jury, "Have you kept records of this," you see?

Mr. Wiggenhorn: Yes.

The Court: Now, you see what that does to the jury? The jury is entitled, then, to expect a record of this operation, and if it is another operation, what difference does it make. If he wants to testify as to a general operation, or how much [154] it costs to raise a bushel of wheat, I suppose he can do that, but he can't base it upon any record of what he has done operating three times the land he is here concerned with. It just wouldn't help the jury.

Mr. Wiggenhorn: Here was my position—maybe your Honor will sympathize with me—when I asked if he kept records: A witness could go on the stand and say it cost me so much to raise a bushel of wheat, but when a fellow says, "I am not pulling that out of a hat, I have been keeping records of the operation over the years, whether on this farm or another one, I kept some records," he is talking with some degree of authority. When he says he can tell you from records he kept, he can tell you with some authenticity that it costs so much to raise a bushel of wheat.

The Court: Of course, he can tell you how much it costs to raise a bushel of wheat, but he is operating and raising wheat on a different spread than this is.

Mr. Wiggenhorn: Let's put it that way. The witness testified, "I have kept records, I know what I

(Testimony of Clarence A. Kolstad.)

am talking about, I am able to tell you it costs me so much to raise wheat on an operation three times as big as this one."

The Court: He has already destroyed the benefit of that altogether himself on the stand when he said the costs are different.

Mr. Wiggenhorn: I will admit that. [155]

The Court: All he has to do is tell us what the cost of operating on this size property is.

Mr. Wiggenhorn: I wish he could do it.

The Court: Get somebody that can. Just because he can't doesn't permit him to testify to something else.

Mr. Wiggenhorn: He can't pull it out of the air.

The Court: He can pull it out of the air, but he will suffer as a result of pulling it out of the air.

Mr. Wiggenhorn: Maybe we had better give your Honor my conception for what it is worth. We are always thinking—I believe we should in these cases, and your Honor has mentioned it yourself—when we are considering what the value is of lands, we must think of it in the light of what a willing buyer would pay. In other words, we must get all the information that a buyer would want to get. He wants to know the cost per acre of production, everything else that goes into an operation, before he will put his good money out. I am very sure a buyer would be extremely interested in the kind of figures—if he knows the man tells him, "It costs me so many dollars per acre to raise wheat," and told him it was on a larger operation than this, it is true it included

(Testimony of Clarence A. Kolstad.)

three times as much land. He knows he has got to discount the figure some for a smaller unit such as this.

The Court: I don't think it is relevant enough.

Mr. Wiggenhorn: I won't go any further, then, your Honor. [156]

The Court: Court will stand in recess until 2:00 o'clock.

(Noon recess.)

(Jury returns to Courtroom.)

Q. Mr. Wiggenhorn, do you know what ordinarily it costs to raise wheat on an acre of ground on a unit of this size in your area?

A. Yes; I do, approximately.

Q. How much does it cost per acre?

Mr. Galles: I will object to that as being immaterial unless a foundation is laid that it has some relationship to the market value of land.

The Court: Yes; that is, unless a foundation is laid that the cost of raising wheat has something to do or some relation to market value.

Mr. Galles: That's right.

Mr. Wiggenhorn: I am not sure I understand the implications of this.

The Court: I think, counsel, that the government's position is this: That what we are interested in is the market value. Now, the defendant has testified as to what the market value is. Now, if the cost of raising wheat doesn't have any relationship to the market value, then what is the evidence for? It

(Testimony of Clarence A. Kolstad.)

doesn't prove anything; it doesn't assist us in any degree.

Mr. Wiggenhorn: I don't want to find myself in the position of arguing; I am just trying to get straightened out. [157]

The Court: I would be glad to have a conference with you, counsel.

Mr. Wiggenhorn: Maybe that would be better. I don't know whether this is fundamental to your objection or not.

The Court: All right. We will save time in the long run, I believe, by having a conference.

(Jury admonished.)

(Jury withdraws from the Courtroom.)

Mr. Wiggenhorn: What I want to inquire is this: I think we have—I know before at pretrial conference there has been some discussion about whether or not earnings from land are material in connection with proving value, and I think, my own conception of it was that they themselves do not determine value, but, nevertheless, under the conception one has, a willing buyer and a willing seller, the willing buyer is concerned with earnings. He wants to know not only that the price that he pays is the reasonable market value, but also that he will have sufficient earnings to justify paying that price, and that while earnings do not themselves prove value——

Mr. Galles: That is the foundation I think has to be laid.

(Testimony of Clarence A. Kolstad.)

The Court: Just lay that foundation and we will admit it.

Mr. Wiggenhorn: We have got in evidence already what the reasonable value of it is. The rest would be argument, purely, what I have been saying so far is argument. [158]

The Court: Yes; what you are saying is argument, that is true.

Mr. Wiggenhorn: I can't lay the foundation for the jury with argument. Facts have to be presented to the jury.

Mr. Galles: That is the point. I am saying that the facts have to be laid as a foundation before the type of evidence you are attempting to get in now is admissible. Otherwise, it is immaterial to the issues.

Mr. Wiggenhorn: Would you object to telling me the type of fact? It seems to me——

Mr. Galles: I don't think counsel needs any assistance from me in this matter.

Mr. Wiggenhorn: Frankly, I will acknowledge my complete shortcomings, then, because it seems to me all one can do it to show with respect to—if it is conceded we may show earnings, there is nothing else you can do but show what this particular unit has earned——

The Court: I think counsel agrees with everything you say.

Mr. Wiggenhorn: What is left for me to do, then? I don't understand.

(Testimony of Clarence A. Kolstad.)

The Court: Just very simply, it is just to have the witness say those things.

Mr. Wiggenhorn: Do you want me to have the witness reason as I did.

The Court: Just have the witness say that earnings affect [159] market value. That is all you have to have him say, as far as I can see. Isn't that your position?

Mr. Wiggenhorn: I will do it with tongue in cheek because I think that is invading the province of the jury. He is not testifying to facts.

The Court: The point counsel makes is this: He says, "I know the market value," and he has testified what it is. Now you are asking him about an element of that market value. First, you should ask him what are the elements of market value, and then if he says that in his opinion, earnings or production or whatever else it is are a part of the things that make up market value, why, then, you can proceed. Is that your position, counsel? That is, as I understand it, and that is as I understand the law.

Mr. Wiggenhorn: Very well, I think that is all, then. The jury may be recalled as far as I am concerned.

The Court: Very well.

(Jury returns to Courtroom.)

Q. (By Mr. Wiggenhorn): Mr. Kolstad, do earnings enter into——

Mr. Galles: I will object to the form of the question as it starts as a leading question.

(Testimony of Clarence A. Kolstad.)

The Court: Quite obviously it was going to be a leading question.

Q. What, ordinarily, Mr. Kolstad, enters into an opinion on [160] market value?

A. Oh, there's a lot of different things, the distance it is from the elevators for delivering wheat, the size of the block, as to whether it is blocked up nice for large fields, and its ability to produce as to its net profit, how much it cost to raise it in the particular area where it is.

Q. Do you know what it costs to raise wheat on an acre of ground of the character here in this size unit we are dealing with that you own?

A. Yes; I do.

Q. What is the cost per acre?

A. It would be in the neighborhood of thirteen or fourteen dollars per acre.

Q. Is that also translatable into bushels, are you able to say how many bushels it takes?

A. Yes; it would be around two dollars or a little better per bushel, it would run about—between six and seven bushels per acre.

Q. By the way, were there any improvements on this farm of yours at the time it was taken?

A. Some fences.

Q. Other than fences, was there anything?

A. There was a sheep shed on it.

Q. How large was the sheep shed?

A. Oh, I'd judge about a hundred by a hundred. It was a [161] straw roofed shed, made out of poles.

Q. How many miles—well, how much fence, in

(Testimony of Clarence A. Kolstad.)

miles or otherwise, was taken by the land that was taken? A. Oh, I'd judge about ten miles.

Q. If we consider what was left after the taking, are you able to tell us what—how many miles of new fence would have been required to enclose the remainder of the land?

Mr. Galles: I will object to that as being immaterial.

The Court: Sustained.

Q. Well, however that may be, the value of the fence that was there on the land that was taken, and the sheep shed that you have mentioned, did you add that to the calculation you made as shown in your Exhibit 6, or did you not? In other words, did you add that to the value, or was that considered in the value?

A. I just really threw it in; it is considered in there.

Q. So that when you arrived at a \$450,000 value before the taking, which you justify here by a somewhat larger figure, you just didn't give any added consideration to the improvements you have testified to? A. No; I didn't add it in.

Q. Now, then, so much for this place of yours, Mr. Kolstad. At the time of the taking, did Alta A. Kolstad also own a place? A. Yes. [162]

Q. And Alta A. Kolstad is your wife, is she not?

A. Yes; she is.

Q. Where does the place of Alta A. Kolstad lie with reference to your place?

A. Just to the north.

(Testimony of Clarence A. Kolstad.)

Q. Will you mark—will you step down here again, Mr. Kolstad—this morning you marked on this map the general outlines of the place owned by you, will you likewise do that with the Alta A. Kolstad place?

(Witness does as requested.)

Q. And you have written on that portion, you have marked Alta A. Kolstad in red?

A. Yes, sir.

Q. Does it extend likewise into Toole County?

A. No.

Q. It is all in Liberty County?

A. It is all in Liberty County.

Q. You may resume the stand. So then when we get back to Defendants' Exhibit 5, it lies to the north and slightly west of 5, does it, or just north of 5?

A. Just north, directly north. It fits right into it, there is no land in between them.

Q. Are you familiar with that place of Alta A. Kolstad? A. Yes; I am.

Q. What exactly have you had to do with it? [163]

A. I have been operating it.

Q. How long have you been operating it?

A. Since 1942.

Q. Have you operated it ever since Alta Kolstad has owned it?

A. Only for a five-year period when it was leased out.

Q. And during that five-year period when it was

(Testimony of Clarence A. Kolstad.)

leased out, your own was likewise leased out, wasn't it? A. Yes.

Q. So that the fact is that you have been operating this place along with your own place?

A. Yes.

Q. All through the years that you have been operating your place? A. That's right.

Q. Now, I have again put on the easel here another exhibit, and will you mark this, please, Mr. Clerk?

The Clerk: Defendants' Exhibit 7.

Q. The exhibit I have just referred to has been identified and marked as Defendants' Exhibit 7, and will you tell us whether this, in similar manner to the previous Exhibit 6, I guess it was—5, is likewise a map of the Alta A. Kolstad place with the coloring representing the classifications as you have testified? A. Yes. [164]

Q. How many acres in that place?

A. About 4,700.

Q. Now, do you have the same familiarity with that place as you do with your own?

A. Yes; I do.

Q. You, yourself, have been farming it, excepting, as you say, when it was leased?

A. Yes.

Q. The last three years, however, it has not been leased, nor has yours been leased, is that correct?

A. No; I operated it.

Q. I believe you testified this morning also that

(Testimony of Clarence A. Kolstad.)

you are familiar with the market value of farms in that vicinity? A. Yes.

Q. And can you give, can you tell us—are you able to tell us what the fair market value of this farm is the same as you did about your own, to the same extent? A. Yes; I am.

Q. And have you likewise again prepared or had prepared a statement, breakdown of the classifications and values similar to our Defendants' Exhibit 6? A. Yes.

Mr. Wiggernhorn: Your Honor, I neglected to pass Defendants' Exhibit 6 to the jury. May I do that now? That was the one that was introduced this morning and received in [165] evidence?

The Court: Yes.

Q. I hand you what has been marked as Defendants' Exhibit No. 8. Now, then, referring to the exhibit—— A. You gave me the wrong one.

Q. I did? A. That is the joint one.

Q. To keep the record straight, I am now withdrawing from you what is marked Defendants' Exhibit No. 8, and hand you in place of it Defendants' Exhibit No. 9, and do you identify that as the statement you just referred to that shows the breakdown of classifications for the Alta A. Kolstad place?

A. Yes.

Q. Very well. How many acres are there altogether, were there altogether in the Alta A. Kolstad place before the taking, immediately before the taking on May 24, 1955? A. 4,699.87.

(Testimony of Clarence A. Kolstad.)

Q. They are shown on Exhibit No. 8, are they not? A. Yes.

The Court: No; wait a minute, Exhibit 8 is the one you just marked.

A. This is No. 9.

Mr. Wiggernhorn: No. 9. I thank you, your Honor.

Q. And that is the same land that is here before us as Defendants' No. 6, is it—no, No. 7? [166]

A. Number 7.

Q. Now, on this map, Defendants' Exhibit No. 7, will you in similar fashion, to save as much time as we can, again explain what the colorations are on that map, identifying them in each instance as to what classification they represent? You can do it from the chair. A. Red is the tillable.

Q. Red is the tillable, and blue is?

A. Blue is the—I have got to look—blue is the bottom land.

Q. As I observe here, there is just a very little small piece of that? A. Green is grazing.

Q. Red throughout is the tillable?

A. That's right.

Q. And green is what? A. Grazing.

Q. Green is grazing, and we have another color here, what is it, yellow? A. Orange.

Q. That is orange, and what does that represent?

A. Alfalfa. There is only a small part of it.

Q. Identify what you refer to as orange? It isn't very much distinguishable from yellow, is it? But it is this little piece here of probably 120 acres, or something like [167] that?

(Testimony of Clarence A. Kolstad.)

A. No; about 12 or 15 acres.

Q. About 12 or 15 acres of alfalfa. That was in alfalfa at the time of taking? A. Yes.

Q. Then, the yellow is breaking, as it was in the previous exhibit?

A. Yes, and the black is plowed.

Q. And as to this breaking, what you told us before is true, is it— A. Yes.

Q. That it was broken at the time of taking, but had not yet had a crop?

A. It was in summer fallow at the time of taking, and cropped in 1956.

Q. Again, for all purposes, the black and yellow are classed the same by you as plowed ground, are they not? A. Yes, sir.

Q. Very well, with that knowledge, how many acres, at the time of taking or immediately before, how many acres of this Alta Kolstad place were plowed, cultivated? A. 1,666.59 acres.

Q. And how many acres were tillable, did you classify as tillable? A. 1,134.99. [168]

Q. How many acres did you class as grazing land? A. 1,843.29.

Q. And I think you told us probably 12 acres of alfalfa? A. 12 acres of alfalfa.

Q. And were there any other bottom lands there?

A. 43 acres of those creek bottom lands.

Q. That would be blue, would it, I guess that is what you told us? A. Yes.

Q. All right, then, would you—are you able to give us your opinion of the reasonable market value

(Testimony of Clarence A. Kolstad.)

of that entire unit immediately before the take, that is, the Alta A. Kolstad unit? A. Yes.

Q. How much? A. \$342,955.70.

Q. That is what you have broken it down to, and that is what you considered to be the fair market value at that time? A. Yes; I do.

Q. Now, then, the way this exhibit works, as I understand it, on the first overlay, it will show through the transparency the entire tract as it appeared before the take, classified as you have told us?

A. Yes.

Q. When I remove the first sheet of it, the first transparency, [169] what do we find now represented?

A. That is what is remaining after the taking.

Q. As before, is the cross-hatching portion here, does that represent the reservoir?

A. Yes; that's it.

Q. That will finally be the reservoir after it is filled? A. That's right.

Q. Approximately, as you told us this morning?

A. That's right.

Q. Does it show there how that land lies with respect to that reservoir that was left after the take with respect to this Alta A. Kolstad place?

A. Yes.

Q. I note, for example, here, on the south part, and I think you refer to that as the south unit in some of your testimony—— A. Yes.

Q. The south part has a limited number of acres.

(Testimony of Clarence A. Kolstad.)

Do you know how many acres there are there, each square represents 40 acres, does it?

A. There is 360 acres.

Q. Nine times 40, I guess that is 360 acres?

A. Right.

Q. And your Exhibit No. 9 will show, will it not, how you have broken those down after the take? Let's proceed and go [170] through them. Let's take the north unit first. When we refer to the north unit—this is remaining—it would be all of the land north of the reservoir, whether lying contiguous or not, is that true? A. Yes.

Q. By the way, what is this marked yellow here?

A. Well, it is a correction.

Q. Is it a part of the breaking? A. Yes.

Q. That was Alta's ground, was it not?

A. Yes; it is, but it was a correction on the map.

There was an error in it.

Q. But it is actually what you have classed as breaking, have you not? A. Yes.

Q. Well, now, then, looking at that north unit, considering all of it, how many acres did you classify as plowed ground as shown by Exhibit 9?

A. 802.70 acres.

Q. And how many acres of tillable?

A. There are 870.05.

Q. And how many acres of grazing land?

A. 844.20.

Q. Was there any bottom land left at all after the take? A. No. [171]

Q. No bottom lands. Any alfalfa? A. No.

(Testimony of Clarence A. Kolstad.)

Q. So, they were wiped out and buried under water, were they? A. Yes.

Q. Now, let's take a look at the south unit, that is, the smaller piece there below the reservoir. How many acres of plowed ground remained there?

A. 232.90.

Q. How many acres of tillable land?

A. 105.74.

Q. How many acres of grazing?

A. 13 acres.

Q. And bottom land and alfalfa were again obliterated, were they?

A. Yes; there wasn't any.

Q. None remained. And in valuing the land, let's look at the north unit first. You had 1,666 and a fraction acres of plowed ground. What did you value that at at the time of taking?

A. You are talking about the unit before the taking now, is that right?

Q. Yes; I said at the time before the take.

A. At \$120.

Q. So that carries out for that many acres at what figure? [172] A. \$199,990.80.

Q. I notice that you have valued that at five dollars less than you did on your own land?

A. It is a smaller unit.

Q. Is that the only distinction you make, because it is a smaller unit? You mean by that it is a less number of plowed acres? A. Yes.

Q. In the other one, you had 2,551 plowed acres,

(Testimony of Clarence A. Kolstad.)

and in your wife's tract, you only have 1,666, is that your reason for reducing it by \$5?

A. That is my idea of efficiency in operation. It is a smaller unit, and it isn't worth as much.

Q. All right, it is the same thing you spoke about. The tillable, you valued at what? A. At \$90.

Q. You valued it at \$90, and extended for that 1,134 acres, how much did it amount to?

A. \$102,149.10.

Q. What did you value the grazing at?

A. At \$20.

Q. That extended would be how much?

A. \$36,865.80.

Q. And then we have the 12 acres of alfalfa here.

What did you value that at? [173] A. \$150.

Q. I think we never mentioned the value of alfalfa before because on your place there was none?

A. No.

Q. And what is your justification of that value, if you have any?

A. Well, I feel that this was under irrigation. I had it irrigated by a well I had there, and I feel that irrigated land was worth more money than wheat land by a little. I valued it at \$150.

Q. As alfalfa land in itself, what did it produce on the average per year in the way of hay?

A. The last two years I didn't raise any hay on it. Before that we produced—just took one cutting from it, about a ton and a half.

Q. Was that all that it was capable of producing, one cutting?

(Testimony of Clarence A. Kolstad.)

A. No, it wasn't but we just didn't tend to it, it was such a small acreage, and we never paid too much attention to it. We was too busy raising wheat.

Q. You are referring to this particular 12 acres (indicating)? A. That's right, 12 acres.

Q. All right. Now, then, what about the other 43 acres of bottom land, what did you value that at?

A. \$50.

Q. And that extended is \$2,150? [174]

A. That's right.

Q. That is the way you came to make up your total of \$343,955.70, is that right? A. Yes.

Q. Now, again, going back again to look at the tillable, I see you have classified it and valued it at \$90 an acre, whereas, in the case of your own parcel, you valued it at \$95 an acre. Would the same explanation hold that you gave a minute ago for the cultivated land, you reduced it \$5 an acre in her case because of the smaller size of the operating unit?

A. Yes.

Q. The grazing land, you valued at the same as yours, and the bottom land I see you valued at \$50 per acre in this case. Now, let's take a look at the value after taking. Do you distinguish between the north and south unit?

A. Yes; I took them separately.

Q. You might tell us first whether the two could in any manner be operated or considered as a remaining unit, and if not, why?

A. No; because there is too much water in be-

(Testimony of Clarence A. Kolstad.)

tween and it is a little too deep. In order to get around, it would take, oh, about 12 or 14 miles to drive around on other people's wheat to get from one to the other.

Q. In the other case, in your own case, of course, you did [175] have to go around the lake formed by the Marias River, while in this case we have to go around the portion of the lake formed by Willow Creek? A. That's right.

Q. So, it isn't quite as far around as you told us this morning it was in your own case?

A. No.

Q. It still is how much?

A. Oh, 12, 14 miles.

Q. And does that make it such a distance as the difficulties presented in moving equipment make it so you couldn't operate it as one unit?

A. No, because you can't get through there with equipment unless you got a right of way from the neighbors.

Q. Very well. Now, let's take a look at the north unit. First, what did you value the remaining plowed or cultivated ground at per acre?

A. On the north unit, \$100 per acre.

Q. How many acres were in that?

A. 802.70.

Q. And that extended out makes how much?

A. \$80,270.

Q. You valued those 802 acres and a fraction acres at \$80,270 at \$100 per acre. I notice you de-

(Testimony of Clarence A. Kolstad.)

preciated it from its before value by \$20, and what is your justification for [176] that?

A. Because it made the unit smaller. It isn't more than about half as large as it was.

Q. Is your opinion, then, for the purposes of valuation that it justifies you in reducing it \$20 by reason of this differential in the size of the two units, it is about half the size of what it was before?

A. Yes; I think I am leaning over backwards. It has gotten to the point where it isn't even an economic unit.

Q. What about the tillable ground, you have 870 acres there, and you valued that at what?

A. \$80.

Q. Carrying it out, that would be \$69,604, is that correct?

A. That's correct.

Q. I notice there that you have dropped \$10 again per acre from what you valued the tillable ground in the larger unit before, in the whole unit before the taking. Do you justify that for the same reason that you did just a moment ago for reducing the value of the plowed ground?

A. Yes; I do.

Q. However, you only reduced it \$10 an acre in the case of tillable, whereas you reduced it \$20 in the case of the plowed ground. Have you any explanation for that?

A. Well, there is less tillable there, and the plowed ground that is plowed has a quicker value to me than tillable ground [177] because it takes

(Testimony of Clarence A. Kolstad.)

two years to get it into production, so I gave more drop in value to the plowed ground.

Q. How many acres of grazing land did you have left in the north unit? A. 844.20.

Q. And you valued that at what after the take?

A. \$5. It has been cut away from water, and has gotten so small it really has no value as a unit. It wouldn't carry any stock anyway.

Q. Is water available from any source for that grazing land remaining there?

A. Two sources away in the west end, the artesian well and the reservoir within a quarter of a mile of each other.

Q. There is an artesian well? A. Yes.

Q. And could stock get from that grazing land over to the artesian well?

A. Well, the grazing land is in the east end, it is about four or five miles away.

Q. You are suggesting it is too far away, is that what you are driving at?

A. Yes, for most of the grazing land, yes.

Q. What, then, was the total of those valuations for the north unit remaining, what does that amount to as you valued these classifications? [178]

A. \$154,095.

Q. Looking now at the south unit, how many acres of plowed ground remained down there?

A. 232.90.

Q. And you valued that at what price?

A. \$90.

Q. Let's pause there a minute again. That is \$10

(Testimony of Clarence A. Kolstad.)

under that \$100 value you put on that ground in the north unit. What is your explanation or justification for that? A. It should be less, I guess.

Q. Less than what?

A. I have got it too high; it is all by itself.

Q. You mean \$90 is too high or \$100 is too high?

A. \$90 is too high.

Q. So you think that you were over-generous there, do you? A. I think I was.

Q. But, at any rate, that is what you have, and that is what you arrived at——

A. I am going to leave it there.

Q. And that is what you are testifying to here now, are you? A. Yes; I am.

Q. And that extended out amounts to \$20,961, does it? A. That's right.

Q. You have 105.71 acres of tillable left, do you, on the south unit? [179] A. Yes.

Q. What did you value that at? A. \$70.

Q. Carried out, that would amount to how much?

A. \$7,401.80.

Q. I take it that your justification for cutting that down to \$70 from \$80 that you allowed for the north unit, and from \$90 that you allowed for tillable land before taking is for the same reason you have just given in the case of the north unit, only the south unit is still smaller, is that right?

A. That's right.

Q. How many acres of grazing were left in the south unit?

A. 13 acres—no—yes; 13 acres.

(Testimony of Clarence A. Kolstad.)

Q. This little patch of green in here (indicating)? A. Well, it is a draw.

Q. That is a draw there? A. Yes.

Q. Well, did you put any value on that at all?

A. No; I didn't; it has no value.

Q. Well, why do you say that?

A. It can't be used for grazing.

Q. It is impractical to use it for grazing purposes on that small a unit?

A. It would be pretty hard to run cows on 13 acres. [180]

Q. So your total value, then, for the south unit is how much? A. \$28,362.80.

Q. Did you add together, and is it shown here on your exhibit what the sum of the north unit and the south unit are? A. Yes; \$182,457.80.

Q. And you have previously testified that your value of the entire 4,699 acres before the take was \$342,955 and some cents, and you have just told us what the value of the two separate units, as given by you, remaining here, and what is the difference between those? A. \$160,497.90.

Q. Now, going back again to look at the entire unit before the taking at the value that you have ascribed to it and given your opinion, how much does that figure across the board per acre?

A. \$75.

Q. And how many acres were actually taken, that is the difference between the amount taken and the amount remaining? Do you have that figure? I think

(Testimony of Clarence A. Kolstad.)

you have it in a memorandum in your pocket if you don't have it before you.

A. 1,831.28 acres taken.

Q. Did you also calculate what price—withdraw that much. If you calculated that 1,831.28 acres at \$75 an acre, the price which was your across-the-board price before the taking, [181] for your entire tract, what figure do you get? A. \$137,325.

Q. Did you also figure how—withdraw that question. Oh, yes, are there improvements on this place, Mr. Kolstad?

A. Yes; there was a set of buildings and some fence.

Q. Well, tell us briefly what buildings there were on the place.

A. Well, there was a ranch house, a five-room house; there was a barn, a workshop, a bunkhouse, a small garage, that's it.

Q. Could you give us your opinion about the fair market value of those improvements?

A. Oh, I roughed them in at about \$7,000.

Q. You have mentioned an artesian well, was that also on this place?

A. It is just out of the taking.

Q. Can you locate it for us here?

A. I think so. Yes; it's right here (indicating). It really isn't in the taking, this is a little wrong. Right in the corner of that. The water shouldn't be up there, that 40 isn't in the taking.

Q. It should be just above that out of the taking?

(Testimony of Clarence A. Kolstad.)

A. Yes; maybe the map is just a little bit wrong—right on the edge of the taking.

Q. You admit that artesian well was not destroyed and [182] was left to you? A. Yes.

Q. It is still there? A. It is still there.

Q. What about that artesian well, what is its value, what purpose does it serve?

A. Well, it was a good well for irrigation, and I had—I was building up to irrigate the land below it there, but that's all in the take. Now, there is no more level land where the well site is. Oh, there is a few acres left, but the water should have gone from that well over on this land that's in the take.

Q. For irrigation purposes, if you were going to irrigate with it, why the land within the take would have been irrigated from the well?

A. That's right.

Q. Can you tell me whether it is bottom land or plateau land?

A. It is bench land from Willow Creek.

Q. What kind of a well was it? How deep was it?

A. Twenty-two hundred feet.

Q. How did it happen to be there?

A. Well, it was supposed to have been oil, but it turned to water, so I bought the casing and saved it.

Q. You saved it. You mean it was drilled [183] for oil? A. Drilled for oil.

Q. The well had a casing in it? A. Yes.

Q. Never been pulled or removed?

A. No; I bought it.

Q. Casing still in the well? A. Yes.

(Testimony of Clarence A. Kolstad.)

Q. Was it flowing, a continuously flowing well?

A. Yes; it had 130 pounds pressure at the top of the hole.

Q. Are you able to tell us about what the flow was in miners' inches, or don't you know anything about miners' inches?

A. No; when the drillers were there, one of the men knew something about the capacity and he said it would put out about 20,000 barrels a day, that is in twenty-four hours.

Q. Is it still flowing?

A. Well, it is shut off, it will flow if I open it.

Q. It doesn't have to be pumped?

A. Oh, no; not at 130 pounds pressure.

Q. Do I understand then that the land remaining there on the Alta Kolstad place with the well serves no useful purpose, or does it serve as stock water?

A. It will serve as stock water at that end of the place. [184]

Q. Had the land not been taken and Mrs. Kolstad kept the land as it was before the taking, would that water also serve to assist in watering stock?

A. Oh, yes.

Q. However, as I understood you to say before the taking on this Alta Kolstad place, likewise on your place, there was ample water for stock from Willow Creek, is that right?

A. Yes; that's right. This water was good for winter, it was warm water, and better than chopping a hole in the ice.

(Testimony of Clarence A. Kolstad.)

Mr. Wiggenhorn. You have Exhibit 9 there now, do you? We will now offer in evidence Defendants' Exhibit 9.

Mr. Galles: No objection.

The Court: Admitted.

(Defendants' Exhibit 9, being statement showing breakdown of classifications for the Alta A. Kolstad place above referred to, was here received in evidence.)

Mr. Wiggenhorn: Now, we offer also—withdraw that.

Q. With reference to this Defendants' Exhibit 7, similarly as in the case of the earlier Exhibit 5, was this made again from your own maps?

A. Yes.

Q. And this is a duplication of your maps in a similar manner as the other Exhibit 5 was made up?

A. Yes; same way, by the same man. [185]

Mr. Wiggenhorn: We offer in evidence Exhibit 7, Defendants' Exhibit 7.

Mr. Galles: No objection.

The Court: Admitted.

(Defendants' Exhibit 7, being the map above referred to, was here received in evidence.)

Q. Now, then, do you have an interest in another unit on the farm beside the two you have testified to, one belonging to you and one to your wife, now is there a third one? A. Yes.

Q. Who does that belong to?

(Testimony of Clarence A. Kolstad.)

A. We own it jointly.

Q. You and who? A. Mrs. Kolstad.

Q. Come forward again and identify that on Exhibit 2.

A. It is going to be kind of rough.

Q. Just give an approximation.

(Witness does as requested.)

Q. You have marked that "Joint"?

A. Yes.

Q. That is outside of Liberty County, as this map shows, but you intend to say that adjoining out in the west is Toole County, and this is entirely within Toole County, is it?

A. It jogs back and forth. [186]

Q. It is principally in Toole County?

A. Yes.

Q. And where does it lie with reference to the Alta Kolstad place and your own place, the Clarence Kolstad place?

A. Well, mine is in here (indicating). Mrs. Kolstad's is in this area, and this is the county line (indicating).

Q. Let's get that for the purpose of the record. You are now pointing to something on the new exhibit I have put up here, Defendants' Exhibit 10, and maybe for the purposes of identification, similarly as in the previous exhibits with respect to your place and Mrs. Kolstad's place, the exhibits numbered——

A. 5 and 7.

Q. 5 and 7, thank you; you have here depicted

(Testimony of Clarence A. Kolstad.)

the farm or unit owned by you and Mrs. Kolstad jointly, have you not? A. Yes.

Q. And, now referring to Defendants' Exhibit 10, will you orient us and show us where your place——

The Court: Pardon me. I think I will take a recess now before we get started on the new exhibit. (Jury admonished.) Court will stand in recess until 10 minutes after 3:00.

(10-minute recess.)

Q. Now, this unit you have told us about owned jointly by you and Mrs. Kolstad, did you likewise have prepared a plat similar to Exhibits 7 and 5, the respective plats for the [187] Alta Kolstad place and the Clarence Kolstad place, did you likewise prepare a third one for the jointly held property?

A. Yes; I did.

Q. And that is the one that is now on the bulletin board and has been marked as Defendants' Exhibit 10? A. Yes.

Q. Did you follow the same plan in the classification and in the colorations appearing on that map as in the other two? A. Yes.

Q. I observe, and I think I should make a confession properly to the Court, we found an error during recess. We neglected to complete this map. I would improvise a little bit and have the witness explain. I see that there is an extra marking here in the way of cross-hatching in blue on some of this map that was just put in here during recess?

(Testimony of Clarence A. Kolstad.)

A. Yes.

Q. What does it represent?

A. It is mostly bottom land. There is just a little alfalfa sticks into it which won't show now.

Q. At any rate, this much is true: Everything shown in color, including the cross-hatching in blue, was part of the land owned by you and Mrs. Kolstad jointly before the taking? A. Yes.

Q. Did you use the same color scheme and designations as you did in the other two? [188]

A. Yes.

Q. Now, then, did you also again work out the tabulations on a sheet as you did in the other two cases? A. Yes; I did.

Q. I hand you now Defendants' Exhibit 8, and ask you to identify that as to whether that is the sheet you are referring to? A. Yes; it is.

Q. What do you state to be in your opinion the reasonable, the fair market value at the time of the taking of the entire tract, and by the way, how many acres are in that tract? A. \$7,423.15.

Q. And what is your opinion as to the fair market value of that immediately before the taking?

A. \$507,981.70.

Q. And now we shall proceed as before to break that down. How many acres of that is plowed ground, before the take? A. 1,560.48.

Q. What did you value that at? A. \$115.

Q. An acre? A. Yes, sir.

Q. Amounting to how much for the full acreage?

A. \$179,455.20. [189]

(Testimony of Clarence A. Kolstad.)

Q. Now, I observe that again you have dropped your value from the other two tracts, the unit value per acre for the plowed ground to \$115. You had them at \$125 and \$110 before. What is your explanation of that?

A. Most of this ground is south of the river, and it is a little lighter soil; it is not as good soil as north of the river.

Q. I think I misspoke there in the reference I made to the previous land. It was \$125 and \$120, and this one you made \$115? A. That's right.

Q. You say there is a little lighter soil on part of it? A. Yes.

Q. Which part? A. South of the river.

Q. How many acres of tillable ground on that tract originally? A. 1,754.48.

Q. And that you valued at how much?

A. \$95.

Q. And that extended out to how much?

A. \$166,635.60.

Q. Again, did you drop that valuation down from the previous value you put on the Clarence Kolstad and the Alta Kolstad properties? [190]

A. I don't think I dropped it at all because most of the tillable land is north of the river.

Q. I observe you have it valued at the same price you did on your own land, the tillable at \$95 an acre, is that right? A. Yes.

Q. I think you have extended that. How many acres of grazing land were there?

A. 2,123.62.

(Testimony of Clarence A. Kolstad.)

Q. What did you value that at? A. \$20.

Q. The same value as in the other two cases, did you? A. Yes.

Q. Extended it amounts to how much?

A. \$42,472.40.

Q. How many acres of alfalfa ground, if any, were on this tract? A. 201.50.

Q. And that you valued at how much?

A. \$150.

Q. You have already justified that value before. Does the same hold true with respect to this alfalfa ground as in the case of Alta Kolstad?

A. Yes; this was located on the Marias River on the bottom.

Q. You do have a considerably larger acreage on the joint tract, do you not, than on the Alta Kolstad tract? [191] A. Yes.

Q. Of alfalfa, is that right? A. Yes.

Q. How many cuttings of hay were you getting off of that during the years past? A. Two.

Q. Was it capable of producing more than that?

A. No; that is all there was produced in that area; that is as long as the season is.

Q. Is that one cutting or more than one cutting?

A. Two cuttings.

Q. How many tons per acre did you get per year?

A. It would average out about two to two and a half.

Q. I think probably we should make that clear here. What is classified by color here as alfalfa

(Testimony of Clarence A. Kolstad.)

ground is what I would call orange and will be shown here on the map, I believe. Was any part of it what we have now cross-hatched in blue? Was any more of that in alfalfa that is not shown in the map?

A. I think there was a little stretch in there, but, anyway, the 201 acres is down in that area.

Q. That is correct; 201 and a fraction?

A. Yes.

Q. How many acres of bottom—extended the 201 and a half acres extended at \$150 amounts to how much? [192]

A. \$30,225.

Q. How many acres of bottom land in addition to the alfalfa were there in this tract?

A. 1,783.07.

Q. That you valued at what? A. \$50.

Q. Extended it amounted to how much?

A. \$89,153.89.

Q. What you gave us before in justification for that value on the bottom land on the other places holds true here, does it? A. Yes.

Q. You think it is worth \$50 an acre under the circumstances you outlined before?

A. Yes; some is good, clear bottoms and the others are brushy bottoms. One of them was real good for wintering.

Q. Are there trees and brush on parts of these bottoms? A. Parts of them, and parts aren't.

Q. Do they serve any useful purpose?

A. Wintering stock, certainly.

Q. Shelter? A. Yes.

(Testimony of Clarence A. Kolstad.)

Q. And what about any bluffs otherwise, the natural contour of the ground, the ridges and so forth, are there any such there along the bottoms to form shelter for cattle? [193] A. Yes.

Q. What have you to say as to bottoms as to whether they are suitable for feeding cattle and wintering them?

A. It's the best place there is.

Q. Those are right on the Marias River, are they not? A. Yes.

Q. They are better than the bottoms on Willow Creek?

A. Yes; they are deeper and larger bottoms.

Q. Now, we will go through the same operation and take the first sheet off here, which, as I understand, represents the entire tract, and the first sheet has only the taking on it, and we have left then—what is depicted here?

A. How many acres?

Q. What is shown there. Tell us what you find here?

A. That is what is left remaining after the taking.

Q. There is no mistake about this?

A. No; that is correct.

Q. So again we have the lake shown in cross-hatching as before, do we? A. Yes.

Q. It graphically displays, does it not, how the lake separates this into two parcels now, does it not?

A. Yes.

Q. So you might tell us again whether that lake,

(Testimony of Clarence A. Kolstad.)

as before, prevents farming these two separated pieces as one unit, or [194] can that be done?

A. No; they are too far apart.

Q. How many miles to get around from one to the other?

A. 45 miles from one side around the dam over to the highway and back to the other side.

Q. You have to go over the dam there to get from one to the other?

A. That is correct. There is another way, but that is 80 miles.

Q. To return then to the unit, and by unit, I refer to that north unit, how many acres of plowed ground do you have remaining on the north unit?

Mr. Galles: I will object to this question. There is no foundation laid that they should be treated as separate units.

The Court: In what respect?

Mr. Galles: In regards to market value. I think there was one more question, probably, in the record necessary.

Q. Very well. With regard to the north unit, directing your attention to that first, how many acres did you have in the north unit of plowed ground?

Mr. Galles: I will withdraw the objection. He can proceed.

Q. How many acres? A. 186.40.

Q. And how many acres of tillable? [195]

A. 1,256.90.

Q. Now, then, I will anticipate what counsel has

(Testimony of Clarence A. Kolstad.)

indicated. Will you tell us whether or not this unit as there presented, this north unit, stating as you do it is now isolated from the south portion, as now presented, is sufficiently large in plowed and tillable ground to operate as an economic unit? Could it be economically farmed? A. No; it can't.

Q. You only have 186 acres of plowed ground?

A. Yes, but there is another 1,200 to be plowed, but it would still be only about 1,300 acres.

Q. What value do you put on the 186.40 acres of plowed? A. \$100 an acre.

Q. I think that is the same value you put on the remaining units in the other two cases, is it not, for the plowed ground? A. Yes.

Q. Extended it amounts to how much?

A. \$18,640.

Q. And the tillable acres, the 1,256 acres, what value do you attach to that? A. \$80.

Q. Which, I believe, is the same as you applied to your own and Alta Kolstad's, is that right?

A. I don't remember just how they came [196] out.

Q. Well, it is unimportant. Extended that amounts to how much? A. \$100,552.

Q. How many acres of grazing?

A. 1,030.87.

Q. That you valued at what? A. \$5.

Q. And extended it amounts to how much?

A. \$5,154.35.

Q. Is there any alfalfa ground left in the unit?

A. None.

(Testimony of Clarence A. Kolstad.)

Q. Or any bottom land left? A. No.

Q. All taken by the lake, were they?

A. Yes.

Q. Then, that is all we had of land remaining in the north unit? You have accounted for all of it?

A. Yes.

Q. The total is how much in value?

A. \$124,346.35.

Q. And now, taking a look at the south unit, let's see if we have an economic unit there. How many acres of plowed? A. 1,006.48.

Q. How many acres of tillable?

A. 188 acres. [197]

Q. In your opinion, do those two, the total of those two as potentially plowed ground, is that sufficient acreage to make an economic unit?

A. No.

Q. What value did you put on the 1,006 acres of plowed ground? A. \$90.

Q. And on the 180 acres of tillable?

A. \$70.

Q. And extending out the 1,006 acres at \$90 makes? A. \$90,583.20.

Q. And the tillable extended amounts to how much? A. \$13,160.

Q. And then you had how much grazing land left in the south unit? A. 235 acres.

Q. You valued that at what? A. \$5.

Q. And it extended to how much?

A. \$1,175.

Q. Any alfalfa ground left in the south unit?

(Testimony of Clarence A. Kolstad.)

A. No.

Q. Bottom land? A. No.

Q. We have accounted for all the land remaining in the south [198] unit? A. Yes.

Q. And the total is how much?

A. \$104,918.20.

Q. Have you added together the total remaining in the north unit and that remaining in the south unit? A. Yes.

Q. And what is that? A. \$229,264.55.

Q. Tell us now what your opinion is of the fair and reasonable market value of the remaining land in this joint unit, what the reasonable value was after the take, immediately after?

A. I didn't follow you.

Q. Tell us now what you give as your opinion of the reasonable market value of the land remaining, including both the north unit and the south unit, after the taking?

A. That would be—I thought I gave that to you.

Q. You gave me the sum of the two. I want to know if the sum of the two is your opinion of the fair market value? A. Yes.

Q. Will you give us the figure again?

A. \$229,264.55.

Q. Did you also compute the difference between that value remaining and the value you gave of \$507,981.70 for the [199] value before taking? Did you compute the difference? A. Yes.

Q. What is the difference? A. \$278,717.15.

Q. And as in the other two cases, did you com-

(Testimony of Clarence A. Kolstad.)

pute, with the value you have attached to the entire 7,423 acres before the taking, did you compute the figure of the across-the-board price per acre?

A. Yes.

Q. What was it? A. \$68.50.

Q. \$68.50 per acre across the board is the price you arrived at for the entire 7,423 acres before the taking? A. Yes.

Q. Did you also figure, by these figures that you have just testified to, what the remaining acres—by the way, you might tell us how much acreage there is left? A. There is exactly 3,903.65.

Q. How many were taken? A. 3,520 acres.

Q. And on this 3,903.65 acres, did you calculate what the across-the-board price would be at the value you have attached to it?

A. Yes; \$58.75.

Mr. Galles: How much. [200]

A. \$58.75.

Q. Now, were there any improvements on this jointly owned property?

A. Yes; there was a large barn and a lean-to, a large hog house and a large chicken house.

Q. A bunkhouse on it?

A. No; the house was lost in the flood, and so was the bunkhouse.

Q. What did you value those improvements at at the time of the taking? A. Around \$8,000.

Q. Was likewise some fence taken?

A. Yes.

Q. How much?

(Testimony of Clarence A. Kolstad.)

A. Oh, roughly, about 12 miles.

Q. At any rate, whatever that may be worth, the improvements you have spoken about, did you take them into consideration or add them to the price or figure them in your value or disregard them?

A. Disregarded them.

Q. These values you have given are without regard to the improvements you have told us about?

A. Yes.

Mr. Wiggenhorn: You may cross-examine. [201]

Cross-Examination

By Mr. Galles:

Q. I believe, Mr. Kolstad, in some of the other——

Mr. Wiggenhorn: Just a minute, just a second. I am sorry I forgot to introduce this exhibit. I apologize, Mr. Galles. Defendant offers in evidence Defendants' Exhibit No. 8.

The Court: Any objection?

Mr. Galles: No objection.

The Court: Admitted.

(Defendants' Exhibit 8, being statement showing breakdown of classifications for jointly owned tract above referred to, was here received in evidence.)

Mr. Wiggenhorn: May it be shown to the jury?

The Court: Yes.

Mr. Wiggenhorn: We also offer in evidence Defendants' Exhibit 10.

(Testimony of Clarence A. Kolstad.)

Mr. Galles: No objection.

The Court: Admitted.

(Defendants' Exhibit 10, being overlay map of jointly owned tract above referred to, was here received in evidence.)

Q. (By Mr. Galles): With reference to the improvements on some of the other ownerships, I believe you stated you included the value of the improvements in the land prices. Did I misunderstand you, or is that what you said? [202]

A. Well, I never changed the value per acre.

Q. Did you treat this last batch of improvements, which you said were worth \$8,000, the same way as you treated the others?

A. Yes, I didn't add them to the acres. I left the acres at even money.

Q. In effect, the improvements are included in your valuation, or else I misunderstand you?

A. Well, I guess you just as well call it that. I didn't figure them in the acres. I figured the acre price the same as where there was no improvements. I threw them in for good measure. They burned up some of them anyway, they didn't like them or didn't want them.

Q. Then, as I understand it, you didn't increase the per-acre value because there were improvements on each of these parcels of land?

A. That's right.

Q. Mr. Kolstad, allotment acres are fairly im-

(Testimony of Clarence A. Kolstad.)

portant in determining fair market value of wheat lands, are they not?

A. To a certain extent, yes.

Q. Well, to what extent?

A. Well, that is a pretty hard question to answer.

Q. You mean if somebody is going to purchase a wheat farm, he is naturally going to want to know how many allotment acres there are that he can farm and produce wheat on, is [203] that a fair statement?

A. Yes, it is.

Q. So it has a bearing on what a prospective purchaser would consider in paying for a given wheat farm?

A. Yes.

Q. What are your allotments for each of these three parcels? Will you start with the parcel you own in your own name?

A. I believe I have broken them down so far I will have to do some adding. I broke them down into the taking area and out of the take.

Q. How much work is it to add those together so you can give us the total before the taking?

A. The total of the entire farm before the taking?

Q. That is of the farm that stands in your name only?

A. I am not going to be able to give them to you offhand like that because I have got them cut down too far.

The Court: Let me ask this question, just to

(Testimony of Clarence A. Kolstad.)

speed it along. Did you have an allotment for just the land you own?

A. Certainly. Every piece of land carries its own allotment.

The Court: Every piece. Proceed.

Q. By every piece, you mean you had one allotment for the land that stood in your name and a different allotment for the land that stood in Mrs. Kolstad's name, and a third allotment for the land that is in your joint names? [204]

A. If you go into the allotment office, you can make them dig deep enough to give you the actual allotment for any parcel of land you want.

Q. What do you mean by parcel?

A. Any piece of land, 180 acres, 160 acres, 40 acres, but when it is farmed as a unit, the whole thing is thrown into one, and then you are prorated, your acres are prorated accordingly. It is quite a job.

The Court: That is the question I asked. Did you have a particular allotment for the land you own?

A. It carries a particular allotment, yes.

The Court: What is it?

A. I will have to pull it out of here. I think I have got it here. 800.8 acres.

Q. That is for the before the taking, the entire ownership standing in your name alone, just so we are speaking of the same thing?

A. No, that isn't all of it. I guess I have got it segregated——

Q. I wonder if this is going to take some time?

(Testimony of Clarence A. Kolstad.)

A. If you really want it and want it right, I will have to add it up separately. You want it for all three pieces? I got this out of the Allotment Office. I segregated it down to north of the river, south of the river, and north of the creek so I could get all the pieces straight.

The Court: Tell me this, how do you get notice of your [205] allotment?

A. From the Allotment Office.

The Court: Did they send you a notice?

A. Certainly.

The Court: Do you have that?

A. Sure, the entire farm has a 1957 approved base for factoring allotment of 4,074 acres. Then they break that down into the total amount of allotted acres and the allotted acres was 4,358.8. That is over the whole area you farm.

Mr. Wiggenhorn: I think I can explain this. I have had some experience in trying to run some farms myself. I do understand, however, that when, for example, a man owns a piece of land, he may farm another one belonging to someone else. He can transfer that. He can plant on acres, if he wishes, that are his own, or the rented place, as long as you don't exceed the amount allotted to you. It is interchangeable. That is what makes it unimportant to which fraction it is allotted to. You can put your wheat into any acres you wish.

Witness: There was 9,200 acres under the unit. I went in the allotment office and got them to break it down to get to where I could get away from the

(Testimony of Clarence A. Kolstad.)

one place, or to get the acres allotted to me to Mrs. Kolstad, and I have got them all here, but we have to add them up.

Q. (By Mr. Galles): Would it be easier if you told us how [206] many cultivated acres you had for which you had no allotment?

A. I don't know that, offhand.

Q. You did have some plowed land for which you had no allotment? A. Yes.

Q. In other words, your plowed land exceeded your allotment? A. Sure, everybody's does.

Q. How much does yours?

A. I couldn't give you the percentage at all.

Q. Are you able to figure it so you could tell us how many acres?

A. Sure, I think I could arrive at it. It will take a little calculating. You have to add up a lot of acres.

Q. Well, Mr. Kolstad, what you classed as breaking on these maps was just recently broken, in fact, within a year or two, it has been just plowed up?

A. 1954.

Q. And you have received no allotment for the land you broke up in 1954? A. No.

Q. And, of course, you plowed it up after you knew the dam was going in and the land was to be taken and flooded?

A. I didn't know what land was to be [207] taken.

Q. You knew the dam was going in and certain land would be flooded in your neighborhood?

(Testimony of Clarence A. Kolstad.)

A. Yes.

Mr. Galles: I don't know what is the best way to get the allotted acreages and the acres cultivated for which he has no allotment. I would like to save as much time as possible.

The Court: Do it anyway you want to.

Mr. Galles: I don't know whether a recess would shorten the time for Mr. Kolstad—how long would it take you to get that, Mr. Kolstad?

A. Probably 15 minutes to half an hour if I had an adding machine here.

Mr. Wiggenhorn: I wonder if you could defer that and go on to something else?

Mr. Galles: Yes, I can.

Q. (By Mr. Galles): I want to make reference to your average production, Mr. Kolstad. You stated it was 22 bushels to the acre for the harvested acres or planted acres? A. Seeded acres, yes.

Q. And, of course, attributing production to all of the cultivated land, you have to divide that by two in order to determine what the production was for all of your land under cultivation?

A. Yes. [208]

Q. Now, what farms that you have under operation did you include in that average? Did you include any beside the three tracts you have described here? A. No.

Q. Do you farm other lands?

A. I oversee it.

Q. Oversee it? A. Yes.

Q. Is that land owned by your sons?

(Testimony of Clarence A. Kolstad.)

A. Yes.

Q. You didn't include any of their production in the average you have determined?

A. No, no, that is theirs. It was sold under their name.

Q. This was only production you got from these three pieces and sold under your own name or Mrs. Kolstad's? A. Yes.

Q. Now, what was the—do you remember some of the years, the averages of your production? By that I mean how many bushels to the acre on some of the low years? Can you recite those for the past seven or eight years?

A. Not from memory, no.

Q. Do you have those someplace?

A. Yes, I have some records here.

Q. Was part of that based upon the time you had it leased to somebody else? [209]

A. Yes.

Q. And was that to the Mizner Brothers?

A. Yes.

Q. Did you say they had it under lease for five years? A. Yes.

Q. That was all of the land you have testified to, whether in your name, Mrs. Kolstad's name, or jointly? A. That's right.

Q. As I understand it, when they had it leased, they broke up considerable sod? A. Yes.

Q. How much of this cultivated land is what we call old land, that is, land that is not recently cultivated?

A. Well, when they broke that up, that is 10

(Testimony of Clarence A. Kolstad.)

years ago, that would kind of be old land now, wouldn't it? What do you mean, land besides what they broke?

Q. What years did they have it leased?

A. From 1947 through 1952.

Q. And did they break up all that was broken up during the first year they had it?

A. Mostly the first year, and partly the second.

Q. How much did they break up while they had it?

A. Oh, I imagine about 3,000 acres or some such amount. It might have been a little more than that, too. I don't know unless I would add up the various fields. [210]

Q. Now, is it true that you get better production out of new cultivation than you do out of land that has been cultivated, say, for 20 years?

A. I didn't find any difference.

Q. You didn't find it in your case?

A. There might be a shorter crop the first year of breaking if it happens to have been a dry year. It won't hold moisture as good.

Q. But following the first two or three years, you don't think you get better production out of new land broken than older land?

A. I can't see any difference. It would be pretty fine if there was.

Q. Now, I believe you stated what you took into consideration in arriving at the values you have testified to, that is, what elements go into determining fair market value. What were those again?

(Testimony of Clarence A. Kolstad.)

A. Oh, I said that if it was blocked properly in large fields, it made it more economical; and if it was close to market, and not 30 or 40 miles away from the railroad, it had better market value, and the amount of production entered into it.

Q. Well, now, on Exhibit No. 10, the black portion is all that you have ever cropped on this particular piece of land? A. Yes. [211]

Q. You would consider this properly blocked, or a good blocked piece of property?

A. That is a nicely blocked farm, yes.

Q. The only farm land you have there is a little bit up here in the north portion (indicating)——

A. A hundred or two hundred acres.

Q. ——that isn't properly blocked or of sufficient size to be of much value as wheat land?

A. No, but it can be, the rest of it can be broken up.

Q. This can be broken up (indicating)?

A. Yes, it is all tillable.

Q. You would consider this piece in Sections 2 and 3 I am pointing to now, which are both red and black, would be a nice block of wheat land?

A. Well, it would be fair, yes. Not a nice block. A nice block of wheat land is three or four thousand acres.

Q. I appreciate that. So that north of the river here (indicating), you didn't have any except the portion I am pointing to in Sections 2 and 3 that were anywhere near what you might call a block of farm land? For instance, in Section 9 on the left

(Testimony of Clarence A. Kolstad.)

hand side, that couldn't all be farmed, could it, that you have colored red?

A. Certainly it could, it is all level land.

Q. How would you get, say, from this piece to this piece (indicating)? [212]

A. It isn't that rough, it is just too rough to farm. You can drive cars over there.

Q. Now, would it pay you to farm this little piece in Section 10 (indicating), being disconnected from the larger piece in Section 9?

A. Possibly not, but it would work in with what is under your finger there (indicating).

Q. Do you think somebody on the market would come in and pay you 80 or 90 or 95 dollars for this two or three or 10 acres of cultivated land if he were determining what to pay for your whole unit before the taking?

A. Well, he possibly wouldn't, but it would all average out. I took the average. When you take a piece of tillable ground, you have to take the good with the bad, don't you?

Q. Sure. Well, then, you say, he would pay probably more than 90 or 95 dollars for this land here (indicating), he would pay more for that than he would for some of these little pieces here (indicating) that are five or 10-acre tracts?

A. I think so, yes, I would concede that.

Q. Well, how much more? What would be the highest price of tillable land, that is, sod that hasn't been broken, but is capable of cultivation?

A. If we allow 25 to 30 dollars difference be-

(Testimony of Clarence A. Kolstad.)

tween that and cultivated land for the breaking it out, picking a few [213] rocks and getting it into production.

Q. Your highest figure is \$125 an acre for cultivated land? A. Yes.

Q. Then, on that basis, why the highest figure would be 90 or 95 dollars an acre for the tillable, for the best tillable land?

A. I think 95 or a hundred was what we had on the best tillable land.

Q. For the best tillable? A. Yes.

Q. Other land isn't as good because of the arrangement, that is, sharp corners, crooked turns, that wouldn't be worth \$90 an acre?

A. I don't think I valued it at \$100 an acre, did I?

The Court: Let me suggest this, Mr. Kolstad, don't worry about what you think counsel is asking you about. Just answer his question. He just asked you a question, just answer it and don't try to interpret what he has in his mind, just answer the question. Then, after you answer it, if you think you should say something different to explain, go ahead and do it, but first answer the question. Proceed.

Q. We will get specific, Mr. Kolstad. On this joint ownership, in Parcel No. 10, according to the summary sheet, Exhibit 8, you have got before the taking 1,754.48 acres of tillable land at \$95 an acre. Do you find that? [214] A. Yes.

Q. All right. Now, that 1,754 acres of tillable

(Testimony of Clarence A. Kolstad.)

land is all the land shown on this exhibit in red, is that right? A. Yes.

Q. So that you have attributed a value of \$95 for each acre shown in red on this map?

A. Yes, on the north side of the river.

Q. Well, now, I think that that 1,754 acres is all tillable land, whether on the north or south?

A. I know, but you asked me if I put \$95 on all the tillable land.

Q. Well, did you? A. Before taking?

Q. Yes. A. Yes, I did on the 1,754 acres.

Q. Well, now, are you trying to say that some of the tillable ground north of the river is of a different value than that south of the river?

A. Well, I lowered the value on all land south of the river because it is lighter soil.

Q. Then, the value of the tillable land south of the river is worth less than \$95 an acre, if I interpret what you are trying to say, and the tillable land north of the river is worth more than \$95, is that what you want us to believe?

A. It has a difference in value. There isn't any tillable [215] land over there, only two or three hundred acres of tillable land on the south side.

Q. How much do you think it is worth considering the shape it is in and the type of soil?

A. I just roughed it off at \$95. If I was going to classify every acre and put a value on every 40 acres, it would get tedious. I just bunched it.

Q. You are willing to let it stand that you think

(Testimony of Clarence A. Kolstad.)

it is worth \$95 an acre for the red portion of your joint ownership as shown in Exhibit 10, \$95 an acre?

A. Yes. I think when I measured it off, all those edges were knocked off, all the blocks were measured to arrive at 1,700 acres.

Q. What do you mean by that?

A. That map was drawn from an aerial map and it more or less followed the contour of the land.

Q. This 1,754 acres is accurate, isn't it, for the tillable land in this joint ownership?

A. I wouldn't say it was completely accurate. That is hard to arrive at exactly accurate. I measured all this land, what was fit to plow, that was tillable, going over the land, and I have used my figures from that more so than I used from the map showing all the necks in there. They were discounted.

Q. Well, now, Mr. Kolstad, what I would like to get cleared up is fair market value. Of course, fair market value is what [216] a willing buyer will pay and a willing seller will sell for on the market after fair negotiations, and neither being forced to buy or sell. Do you agree with that?

A. Yes.

Q. All right; what do you think, looking at this joint ownership shown in Exhibit 10, a willing buyer would come in and pay, and a willing seller would be willing to accept, considering where the tillable land is located, and the river bottom and the cultivated land, and the grazing land? Now, cer-

(Testimony of Clarence A. Kolstad.)

tainly, he wouldn't pay on the basis of what you have done here, at least I think you will agree with me, by adding up the number of acres of each classification, arrive at a total and say that is what he would pay? Have you ever heard of a buyer arrive at what he would be willing to pay for a piece of land in that manner?

A. Well, perhaps not, perhaps they don't get that technical but when you go to classify land, how are you going to do it if you don't classify it?

Q. What we are after here is what a buyer is willing to pay for a piece of land located as this is with the different types of land in the locations in which they are, and as it applies to this land; what is he willing to pay? He is not going to end up paying on the end \$81.70. Most of the time it is rounded out at \$150,000 or \$25,000 for land, including all kinds of land, isn't that correct? [217]

A. Yes.

Q. And, as a matter of fact, they don't sit down and break it up by cultivated land or grazing land, and how much each is worth, and then extending them out and arriving at some figure which is in odd dollars and cents. They just don't do that as a practical matter, do they?

A. Yes, they do. When you go to sell land, you break it down. You even consider improvements.

Q. Yes. I think a buyer would probably say, "There is 1,754 acres I might be able to cultivate eventually. I won't be able to get a wheat allotment on it, but I can raise some non-allotted grain on it.

(Testimony of Clarence A. Kolstad.)

It is kind of scattered all over the whole tract. Now, I am not going to agree to pay the full price per acre for that as compared to a nice, square block, all level land that can be cultivated or that already is cultivated and for which you have an allotment." Isn't a reasonable buyer going to think in those terms?

A. Yes, but there is an allotment on that place.

Q. Yes, sure, and that is what you are going to figure out during the recess; how many acres of allotted, and whether it is going to pay anybody to even consider plowing up this tillable land, and whether or not it would be worth paying \$95 an acre for it if you couldn't plant any wheat on it. You will figure out the allotted acreages, anyway?

A. I will figure it out for you, yes. [218]

Q. Now, let's see, Exhibit No. 7 is the land that stands in the name of Mrs. Kolstad alone?

A. Yes.

Q. And that is shown here by classification and color as you have divided it. Now, again we have this tillable land, and I think on that summary you have given a value of \$90 for 1,134 acres, 1,134.99, 1,135 acres of tillable land before the taking, and that those large number of acres are, of course, scattered as indicated on this plat?

A. That's right.

Q. And this tillable, it has not been cultivated, and, of course, there is no allotment for that part?

A. No.

Q. There is an allotment for the black portion

(Testimony of Clarence A. Kolstad.)

shown on the map? A. Yes.

Q. And as an expert witness on land values and what land will sell for on the market, what have you to say about the shape of these tillable lands, and the sharp corners and long narrow fingers, that isn't too attractive to a prospective buyer, is it?

A. I may have gone too far in putting the fingers in. A lot of them are shallow coulees you can go right through. I shouldn't have put them in there. I didn't think it would disturb anybody that way [219]

Q. I am not being disturbed any. We are trying to find out what will this piece of land, what would it have sold for on the market on May 24, 1955, under ordinary conditions as I have previously stated.

A. That is exactly the value I put on there. Had the dam not been built, and had the land been offered for sale at that price, it would have been picked up over night.

Q. And you base that on these figures you have in your summary, so much an acre on such and such type land, and so much per acre on this type, and so on, and you think a buyer would add up the value of the different acreages and different classes of acreages here and agree to pay that price?

A. Well, maybe a buyer with your attitude would just look at the total and take a look at the land and never bother about classifying it and come out and say yes, he would take it.

Q. Oh, on this particular piece of the property,

(Testimony of Clarence A. Kolstad.)

the cultivated land and the land that you have an allotment, a wheat allotment on, is broken up and was broken up, but a mile or two between we have smaller tracts, isn't that true? A. Yes.

Q. So that wasn't—your plowed land of 1,666 acres is not all in one piece, but laid in a half a dozen different pieces of quite irregularly shaped tracts?

A. I think they are pretty well blocked. A lot of them are [220] a mile long, some of them are half a mile long. That is not unreasonable for wheat fields.

Q. A mile is four squares?

A. Four squares.

Q. This is a mile long (indicating)?

A. Yes. There is another one up at the north end that is a mile long.

Q. And then this is several miles long (indicating)? A. Yes.

Q. This piece on the right-hand side (indicating), but it is narrow? A. Yes.

Q. Oh, I think it is on this land that you valued 12 acres of alfalfa at \$150 per acre. Well, now, is such a small tract of alfalfa worth that much per acre?

A. That isn't where it is, it is up there by the well (indicating).

Q. Right in here (indicating)?

A. Right there. I was just experimenting with water with that. I took and planted alfalfa there to see how it would come out. It happens to be there, and that is it.

(Testimony of Clarence A. Kolstad.)

Q. Do you think a 12-acre tract of alfalfa is worth \$150 an acre?

A. Certainly, alfalfa isn't figured at the same value as wheat. After all, there is ditches and small acreages, and [221] you farm it in small acreages. Twelve acres——

Q. How many pieces in the 12 acres?

A. There is three or four ditches in it. It is all in one piece, but if you go to mow it, you have several pieces of hay to mow. It isn't all mowed in one piece.

Q. You say the size of an alfalfa tract doesn't make too much difference in the price per acre?

A. I don't think so as long as it is handy. This happened to be right by the house where our equipment was.

Q. Let's see, now, this Exhibit No. 5 is the land owned in your name alone, and, of course, the same is true here that for the portion colored in black, why, you have at least a certain allotment for the wheat acreage in that? A. Yes.

Q. But there are no allotments for these smaller red pieces that you consider tillable and could be put into production, there is no allotment for that?

A. No.

Q. Is there any prospect for such allotment?

A. Certainly, you can get an allotment anytime. You might have to store wheat two years, maybe three, under bond, and you automatically work into an allotment, and if you have a wheat crop less than 20 acres, they give you that allotment.

(Testimony of Clarence A. Kolstad.)

Q. A prospective buyer——

A. He doesn't want to farm without any allotment at all. [222]

Q. He isn't going to put in too much money for tillable acreages just on the prospect of perhaps getting an allotment in the future?

A. They are doing it. Lands are being bought for a lot more money than I am putting on this.

Q. Do you have any particular sale in mind?

A. I have state sales that went up as high as \$150.

Q. That is where there was competition between neighbors, wasn't it?

A. Yes. Competition is what makes us go, our free enterprise system. If we didn't have it, it wouldn't have any value at all.

Q. It was a pretty small tract of land?

A. I don't remember now, it was a half section or a section.

Q. Yes, I knew of that sale, too.

A. I knew you did. I was trying to be fair. I was giving you a medium price. I wasn't putting it away up at the highest sale ever made.

Q. Well, now, what are—you say you are familiar with sales in the area. As long as we are on this subject, what is the lowest per acre sale you know about of cultivated land? A. Cultivated land?

Q. Yes, within a year or two on either side of the date of taking? [223]

A. You mean tillable land or cultivated land?

(Testimony of Clarence A. Kolstad.)

Q. Plowed land.

A. I think there has been some for 60 or 70 dollars, small tracts, isolated tracts, no complete units, nor was this state sale a complete unit, it was just an isolated tract.

Q. So, there are some low sales about the time of the date of taking here as well as high ones that you know about? A. Certainly there was.

Q. Isn't it true that some of the high sales that you know about had practically all of the land cultivated, it was nicely blocked out—in fact, that \$135 an acre sale, I think I know of that sale, too, that was a nice block of farm land with very little grazing land on it, isn't that right?

A. Just a small amount of grazing.

Q. It was a nice, rectangular piece where the operator could go for three or four miles without stopping?

A. I didn't put that much on my good land that is very comparable to it. I only put \$125 on it.

Q. And, of course, this in your land that you own yourself, you say you have 2,551 acres of plowed land, and you have—of course, you will determine whether you have an allotment for all of that and whether a crop can be grown on all parts of this black land. Now, this size farm is certainly an economic unit, isn't it?

A. It just comes under it. [224]

Q. You think 2,500 acres of cultivated land is the smallest a farmer can make a reasonable living on? A. With any degree of efficiency.

(Testimony of Clarence A. Kolstad.)

Q. Well, maybe that is where we are apart. You mean in order to make a lot of money you have to have 2,500 acres of land, cultivated land?

A. I wouldn't put it that way. You won't make a lot of money on it if you are going to have a reserve built up, a little money in the bank to tide you over the lean years. They aren't all the same. I think with the present price of machinery, you can't buy a set of equipment and keep going on very much less than that, if you are going to raise a family, educate children, and live like you or any other person does.

The Court: I think it's time for a recess. (Jury admonished.) Court will stand in recess until 4:20.

(10-minute recess.)

Q. Mr. Kolstad, you mentioned cattle operations, your place being well suited for cattle. Do you have cattle now?

A. No. After I got the lease back, I never restocked. I knew the dam was coming in and I didn't restock with cattle.

Q. Then you didn't have cattle while the lease was in effect, either? A. No.

Q. The lease started in 1947? [225]

A. Yes, the fall of '47.

Q. Did you have cattle before that?

A. Sheep.

Q. Well, now, you know the livestock business, then, I take it. How long were you in the sheep business?

(Testimony of Clarence A. Kolstad.)

A. Not very long. I am not an expert on cattle and sheep. I wouldn't try to qualify as knowing much about it. We have had cattle off and on on our farm, but in the last few years, I didn't, well, the last almost 10 years I haven't had any stock.

Q. Well, then, when you testified about the use of your land for livestock operations, you don't know what it would handle, how many catttle?

A. I saw them have cattle on it when it was under lease.

Q. Do you know how many acres it takes to support a cow for a full year?

A. We figure about 30 up there, between 25 and 30. If you go down in the bottoms, there, it is a lot less, but on the average grazing acres, we figure between 25 and 30.

Q. That is the average for both bottoms and up-land?

A. No; if you are using the bottoms for wintering, it will drop it down to, maybe between 15 and 20.

Q. And then by a mathematical process, of course, you could figure out how much it would cost for that 15 or 20 acres. Now, I think you stated across the board on this land, you [226] figured, well, on one of them, that is, on Mrs. Kolstad's that I happen to see here, \$75 an acre across the board. Well, \$75 an acre times 15 acres, to take the lowest number, 15 acres to support a cow, if I multiply right, that comes out \$1,125 for the cost of a cow

(Testimony of Clarence A. Kolstad.)

for a year, I mean, the cost of a home for a cow for a year. That is one way of putting it, isn't it?

A. Well, of course, when you figure your grazing in there, you also figure it into the unit, you have got your stubble, you have got your straw. It all adds into taking care of a cow and makes your grazing a little more valuable.

Q. Yes. Now, you mentioned—oh, and do you know what cows were worth about May 24, 1955, an average-size cow, of what, a thousand pounds?

A. I wouldn't remember the market then. I wouldn't want to guess, I imagine about 200 to 250 dollars.

Q. Well, then, confining it to the upland grazing on which you put \$20 an acre, I believe, and you say it takes from 25 to 30 acres of land to support a cow for a year of that type of land——

A. That is about what the College at Bozeman figures on pamphlets I have seen covering this area.

Q. And as an expert on land values, which you profess to be, don't they figure that you can pay for an animal unit in purchasing a farm or a cattle operation about what a cow [227] would bring on the market, isn't that a fair rule of thumb?

A. Certainly it is.

Q. Then, your \$20 an acre, because you don't farm it, it is good only for the cattle operation, figuring 25 acres, we will take the lowest figure, is \$500 for that, for the cost of the home for a cow for a year, when you agree with me that it should be down around \$200, which is the price of the cow.

(Testimony of Clarence A. Kolstad.)

A. You are trying to take this apart all the time. If you take the grazing land alone, put it out by itself, maybe it don't have that value. Connect it with the rest of the place, it has more value.

Q. You are the one that started breaking it down, you see, by so much an acre.

A. How else was I going to arrive at it. If you want it the other way, I will give you the total over-all price.

Q. That is what we want.

A. I gave you the over-all price for the entire place.

Q. But you got that by breaking it down and adding the value of the component parts, didn't you?

A. It was my way of doing it, certainly.

Q. And that is what you did in arriving at your valuation, but you now don't like the way I am tearing it apart when questioning you about an animal unit. I am trying to show that is not a proper way to do it under good appraisal [228] practices for fair market value. Now, on which tract, Mr. Kolstad, is the artesian well; is that owned by you or Mrs. Kolstad, or jointly?

A. Mrs. Kolstad.

Q. And, of course, that you say is good for a cattle operation, and particularly winter, because it is warm water?

A. Right.

Q. Can you use that water for irrigating?

A. I was using it, I was using it on that 12 acres of alfalfa, trying it out, seeing how it would work.

Q. How did it work?

A. All right.

(Testimony of Clarence A. Kolstad.)

Q. It had sufficient mineral content, coming from a depth of 2,200 feet, to be good irrigating water?

A. Well, I sent a sample in to Helena, to the State Sanitary Board, isn't it, and also the Live-stock Commission, and on into the Bozeman State College. They passed on it for stock water and irrigation water, and for human consumption, if you could take it. There is a little sulphur in it.

Q. It would be good for human consumption for anybody that liked a little taste of sulphur in it?

A. Strong sulphur.

Q. But, as you stated, I believe, that artesian well is still on the remaining property? [229]

A. Just over the line.

Q. And can be used in conjunction with the same purposes except for the irrigation of that alfalfa down below which you no longer own?

A. All the land below which was not taken, or which was taken was subject to irrigation.

Q. When you say subject to irrigation, where would you get the water to irrigate? Would you take it all from this artesian well?

A. Well, I have talked with various people that figured it would have irrigated possibly 100 acres with the output from the well.

Q. Did you have water rights in the Marias River?

Mr. Wiggenhorn: Just a minute, we object to that because unless it can be shown the stream is

(Testimony of Clarence A. Kolstad.)

adjudicated, to speak about having water rights in the river is a matter of priority entirely.

The Court: He is asking.

Mr. Wiggenhorn: I submit the question can't be answered. He should ask if it had been adjudicated.

The Court: Overruled.

A. I don't have any rights. I always used all I wanted and nobody ever stopped me.

Mr. Wiggenhorn: Ask that the answer be stricken because the question is an improper question. Whether a man has rights, [230] water rights, everybody has rights——

The Court: He says he doesn't.

Mr. Wiggenhorn: That is what I object to. He said he doesn't, but it isn't established it has been adjudicated.

The Court: This is cross-examination.

Mr. Wiggenhorn: I realize that. When you ask a witness if he has water rights and he says he hasn't, he is telling the exact truth when the stream isn't adjudicated. When the stream is not adjudicated, it is entirely immaterial whether he has a right or not.

The Court: Overruled.

Q. Mr. Kolstad, with reference to the land owned in your own name, it shows before the taking in your Exhibit 6, 2,551 plowed acres. How much of that was just recently plowed up?

A. In this 2,551?

Q. Yes.

A. Gee, I wouldn't know, unless I looked at the

(Testimony of Clarence A. Kolstad.)

breakdown. I can get it broken down. There is too many acres here, I can't rightly offhand say how many acres in this amount was old ground and how many was new.

Q. Can you recall about what percentage was just recently broken?

A. It would be 10 or 15 per cent.

Q. So, it would be 250 or 375 acres that was just recently broken on the land owned by [231] you?

A. Well, possibly two or three hundred acres.

Q. How about on the land owned in Mrs. Kolstad's name, of the 1,666 acres before the taking of the plowed land?

A. There could be two or three hundred acres there, too, approximately.

Q. It would be more than 10 or 15 per cent of that?

Mr. Wiggernhorn: Object to the question. It is a matter of computation.

The Court: Overruled.

Q. That would be more than 10 or 15 per cent, two or three hundred acres out of 1,600 acres would be——

A. Twelve and a half per cent, wouldn't it, twelve and a half?

Q. Anyway, it was about the same number of acres recently plowed out of the 1,666 acres as it was out of 2,500 acres in your own land?

A. Approximately, yes.

Q. And then, on the jointly held land, there is

(Testimony of Clarence A. Kolstad.)

1,560 acres of plowed land before the taking. How much of that was newly plowed?

A. None. I think that is all old ground.

Q. And when you say recently plowed, or when I say recently plowed, that means in 1954?

A. Probably some in 1953 and some in 1954, late in the fall of 1953. Whenever we had spare time, we would break out a [232] little of it and work it in with the old ground.

Q. What did you plan to do with that land?

A. Farm it; I had it in durum.

Q. You could have raised durum on all of the newly broken stuff under the law?

A. I did the last two years.

Q. Now, I am about through with this. Do you have your figures ready on the allotted acreages?

A. No. I thought you wanted them in the morning.

Mr. Galles: It means that we will have to call you back to the stand for further cross-examination, which is all right with me.

The Court: Do you think you are just about through with him, otherwise?

Mr. Galles: Yes.

The Court: I suppose the better thing to do would be to recess until morning, then. I think it is a little more convenient for everyone.

Mr. Wiggenhorn: I would suggest we do not call another witness.

The Court: Well, then, we had better recess until morning. I would just like to make sure that

(Testimony of Clarence A. Kolstad.)

Mr. Kolstad understands what figures you are calling for now so it will be clear so it will be done in the morning.

Q. (By Mr. Galles): Mr. Kolstad, I would like to have you [233] compute from the figures you say you have and from the records you say you have the allotted acreage, broken down into each of your ownerships, each of the three ownerships here. You understand what I mean? A. Yes.

Q. So we can determine how much of the plowed land in each case you don't have an allotment for on each of these tracts. A. Yes.

Mr. Wiggenhorn: May I ask a question before we adjourn?

The Court: Yes.

Mr. Wiggenhorn: I am sure I overlooked offering some pictures as I did in the Clarence Kolstad case. I see I did neglect to offer and mark them in the Alta and jointly owned land cases.

The Court: Why don't we do that now?

Redirect Examination

By Mr. Wiggenhorn:

Q. First of all, these I am showing you, Mr. Kolstad, are those ones taken on the Alta Kolstad place? A. Yes.

Q. I hand you what has been marked as Defendants' Exhibits 11, 12 and 13, respectively, and will ask you whether those are pictures taken under your direction on the Alta Kolstad [234] place?

(Testimony of Clarence A. Kolstad.)

A. Yes, they are.

Q. And when were they taken?

A. In the fall of 1956.

Q. And will you, starting with Exhibit No. 11, identify that, where it was taken, and what it represents, what it illustrates? A. On the map?

Q. Well, I am not going to bother——

Mr. Galles: I would like to have it shown on the map. I think if the witness would mark in the number of the exhibit, approximately where each number was taken.

Q. It would better identify it if the area of ground or territory that this picture represents was shown rather than the point from which it was taken. Will you do that?

A. This one, this picture was taken right along here (indicating).

Q. Exhibit 11. You are now pointing to maybe about the middle of the southeast quarter of Section 30, are you?

A. Well, it was in that area is where it was taken.

Q. Looking in what direction from the camera?

A. Looking to the east.

Q. Looking to the east, is that your answer?

A. Yes.

Q. It shows what? [235] A. Wheat.

Q. And that was taken when?

A. Just before harvest, right in harvest.

Q. Of 1956? A. 1956.

Q. Now, let's take the next exhibit, No. 12.

(Testimony of Clarence A. Kolstad.)

A. Twelve would be right along, right along——

Q. You are not looking at 12, you have 11 in front of you there now.

A. I meant to put the other away. Right in here some place (indicating).

Q. You are now pointing to a place about——

A. Between Sections 29 and 32.

Q. And on the center line between Sections 29 and 32——

A. It was taken facing south.

Q. And that would be what kind of ground depicted there, is that wheat or stubble, or what is it?

A. It is stubble, but wheat is where the combines are.

Q. In the distance or background, the picture shows, represents wheat, and stubble in the foreground?

A. Yes.

Q. And the combines are shown in the wheat, is that right?

A. Yes. This one was taken facing north.

The Court: When you say this one, which one is it?

A. Exhibit No. 13 was taken the same place facing north. [236]

Q. In other words, 12 is facing south and No. 13 is facing north from this point on the line between Sections 29 and 32, is that right?

A. Yes.

Q. And that one shows what, Mr. Kolstad; is that a wheat field?

A. Wheat that hasn't been cut.

Q. Taken at the same time as referred to?

A. The same time.

(Testimony of Clarence A. Kolstad.)

Q. Give us some idea about what the wheat horizon distance would be from the camera—I want to know how big the field is?

A. It runs up there about three-quarters of a mile.

Mr. Wiggernhorn: We offer Defendants' Exhibits 11, 12 and 13.

Mr. Galles: I have no objection, but I think to keep the record straight it should be noted that the witness has marked the numbers 11, 12 and 13 by dots, which, as I understand it, represents the points at which these pictures were taken.

Mr. Wiggernhorn: I agree to that.

The Court: Very well, they are admitted.

(Defendants' Exhibits 11, 12 and 13, being the pictures above referred to, were here received in evidence.)

Q. Now, I am handing you exhibits numbered consecutively [237] 14, 15, 16, 17, 18 and 19, Defendants' Exhibits in each instance, and will ask you to identify them generally as to whether they were pictures taken of land on the jointly owned property of Alta Kolstad and Clarence Kolstad?

A. Yes, they were.

Q. Take them one by one, and starting with number 14 first, and again, as suggested by counsel, let's identify the point from which taken, and mark 14 at that point?

A. It was taken up the road here some place, on the road.